SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 88

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

RELIANCE FUEL OIL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. a]

IN THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

RELIANCE FUEL OIL CORPORATION, Respondent

APPENDIX TO PETITIONER'S BRIEF—Filed May 8, 1961

[fol. 1] RELIANCE FUEL OIL CORP.

Case Nos. 2-CA-7173 and 2-CA-7280

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

2. 3.60	Charge filed in Case No. 2-CA-7173.
2.29.60	Complaint and notice of hearing in Case No. 2-CA-7173, dated.
3. 7.60	Respondent's answer in Case No. 2-CA-7173, dated.
3.23.60	Order amending complaint in Case No. 2-CA-7173, dated.
3.23.60	Charge filed in Case No. 2-CA-7280.
3.24.60	Amended charge filed in Case No. 2-CA-7280.
4. 4.60	Complaint and notice of hearing in Case No. 2-CA-7280, dated.
4. 4.60	Order consolidating cases dated.
4. 8.60	Respondent's answer in Case No. 2-CA-7280, dated.
4.18.60	Hearing Opened.
4.19.60	Hearing Closed.
7.29.60	Trial Examiner Asher's consolidated Intermediate Report issued
9. 1.60	Respondent's letter requesting oral argument dated. (Denied, see footnote 1 of Decision and Order.)
9. 6.60	Respondent's exceptions to Intermediate Report received.
9. 6.60	Charging Party's exceptions to Intermediate Report received.
1. 5.61	Board's Decision and Order issued.

[fol. 2] IN UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

RELIANCE FUEL OIL CORP., Respondent

Petition for Enforcement of an Order of the National Labor Relations Board—February 14, 1961

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*, as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent Reliance Fuel Oil Corp., its officers, agents, successors, and assigns, Case Nos. 2-CA-7173 and 2-CA-7280.

In support of this petition the Board respectfully shows:

(1) Respondent is engaged in business in the State of New York, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on January 5, 1961, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors, and assigns. On the same date, the Board's De- [fol. 3] cision and Order was served upon Respondent by sending copies thereof postpaid, bearing Government frank, by registered mail to Respondent's Counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 13(g) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, con-

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clusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceeding set forth in the transcript and upon the Order made thereupon a decree enforcing those sections of the Board's said Order which relate specifically to the Respondent's herein, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

/s/Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 14th day of February, 1961.

[fol. 4] DECISION AND ORDER—January 5, 1961

On July 29, 1960, Trial Examiner Sydney S. Asher, Jr., issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent and the Charging Party filed exceptions to the Intermediate Report, and the Respondent filed a supporting brief.[1]

The Board[2] has reviewed the rulings of the Trial Ex-

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[1] The Respondent's request for oral argument is denied as the record, including the exceptions and brief, adequately presents the issues and positions of the parties.
129 NLRB No. 141

[2] Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel.

aminer made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following modifications:

1. On January 27, 1959, immediately after a Board election, and before challenged ballots were ruled upon, the Respondent discontinued its extra-gallonage bonus for drivers, and, on February 2, 1960, instituted a share-the-work system. On February 15, 1960, after executing a contract with Local 355, the Respondent abandoned this share-the-work plan and reimbursed drivers who had lost time as a result of this plan. As the Trial Examiner found, the [fol. 5] Respondent had indicated to its drivers that the share-the-work system was designed to give the employees "a taste of what Local 553 would be," but that if they signed for Local 355 they would be reimbursed for lost days. The record also shows that the extra-gallonage bonus was discontinued as soon as the Respondent was aware that a majority of the drivers had indicated a preference for Local 553. In the context of the promises of benefit and threats of reprisal, set forth in the Intermediate Report, it is clear, and we find, that the Respondent fully intended to interfere with, restrain, and coerce its employees in violation of Section 8(a)(1) of the Act by instituting the foregoing changes in working conditions. Accordingly, we find it unnecessary in this case to apply the doctrine of *American Freightways Co., Inc.*, 124 NLRB 146, upon which the Trial Examiner relies.

2. The Trial Examiner cited *J. S. Brown-E. F. Olds Plumbing & Heating Corporation*, 115 NLRB 594, as authority for his recommendation that the Respondent be required to reimburse its employees for dues paid by them to Local 355 on and after February 15, 1960. However, as the violations found herein involve illegal aid and assistance by the Respondent to Local 355 akin to that involved in *Virginia Electric Co.* v. *N.L.R.B.*, 391 U. S. 533, we shall adopt the Trial Examiner's recommendation for the reimbursement of union dues, but shall rely on *Virginia Electric Co.*, as our authority for the remedy.

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ORDER

Upon the entire record in the case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, [fol. 6] the National Labor Relations Board hereby orders that the Respondent, Reliance Fuel Oil Corp., Massapequa, N. Y., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act by threatening its employees with reprisals, or promising them benefits;

(b) Establishing, promulgating, instigating or putting into effect any change in the conditions of employment of its employees under such circumstances as reasonably tends to interfere with the free excercise of their rights under the Act;

(c) Enforcing, maintaining, performing or giving effect to its agreement of February 15, 1960, with Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, or any modification, extension, renewal or supplement thereto;

(d) Rendering illegal aid or assistance to the above-named labor organization, or any other labor organization:

(e) Recognizing the above-named labor organization, or any successor thereto, as the representative of any of its employees for the purposes of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment unless and until such labor organizations shall have been certified by the Board as the representative of the said employees;

[fol. 7] (f) Encouraging or discouraging membership in any labor organization by entering into, enforcing, maintaining, performing, or giving effect to any contract, agreement, arrangement, or understanding whereby its employees are required to join, or maintain their membership in, any labor organization as a condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959; and

(g) In any other manner interfering with, restrain-

ing, or coercing its employees in the exercise of their rights under Section 7 of the Act, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Amalagated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, as the representative of any of its employees in the appropriate unit described below for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified by the Board as the representative of the said employees;

(b) Upon request, bargain collectively with Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-Burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauf- [fol. 8] feurs, Warehousemen and Helpers of America, as the exclusive representative of its employees in the appropriate unit described below with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All oil burner service employees and fuel oil drivers employed by the Respondent, excluding office clerical employees, salesmen and supervisors as defined in the Act, as amended;

(c) Reimburse its employees and former employees in the above-described unit for all dues paid to Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, on or after February 15, 1960;

(d) Upon request, make available to the Board or its agents, for examination and copying, all records necessary to analyze and compute the amount of reimbursement due under the terms of this Decision and Order;

(e) Post at its office at Massapequa, New York,

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copies of the notice attached to the Intermediate Report and marked "Appendix."[3] Copies of the said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days [fol. 9] thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material; and

(f) Notify the Regional Director for the Second Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

It is Further Ordered that the complaint in Case No. 2-CA-7173, insofar as it alleges that the Respondent violated Section 8(a)(1) of the Act, in other respects than as found herein, be, and it hereby is, dismissed.

Dated, Washington, D. C., January 5, 1961.

Boyd Leedom, Chairman, John H. Fanning, Member, Arthur A. Kimball, Member, National Labor Relations Board (SEAL.)

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[3] This notice shall be amended by substituting for the words "The Recommendations of a Trial Examiner" the words "A Decision and Order." In the event that this order is enforced by a decree of a United States Court of Appeals, the notice shall be further amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

[fol. 10] BEFORE THE NATIONAL LABOR RELATIONS BOARD,
DIVISION OF TRIAL EXAMINERS

Washington, D. C.

RELIANCE FUEL OIL CORP., and COAL, GASOLINE, FUEL OIL TEAMSTERS, CHAUFFEURS, OIL-BURNER INSTALLATION, MAINTENANCE SERVICEMEN AND HELPERS, LOCAL UNION 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,[1] and AMALGAMATED LOCAL UNION 355, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,[2] party to the Contract

Case No. 2-CA-7173.

RELIANCE FUEL OIL CORP., and COAL, GASOLINE, FUEL OIL TEAMSTERS, CHAUFFEURS, OIL-BURNER INSTALLATION, MAINTENANCE SERVICEMEN AND HELPERS, LOCAL UNION 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and AMALGAMATED LOCAL UNION 355, RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, AFL-CIO,[2] party to the Contract

Case No. 2-CA-7280.

CONSOLIDATED INTERMEDIATE REPORT

[fol. 11] Bertram T. Kupsinel, Esq., for the General Counsel.

Cohen & Weiss, by Herbert A. Levy, Esq., of New York, N. Y., for Local 553.

Samual H. Borenkind, Esq., of New York, N. Y., for the Respondent.

Alexander Eltman, Esq., of New York, N. Y., for Local 355.

Before: Sydney S. Asher, Jr., Trial Examiner.

These cases involve allegations that Reliance Fuel Oil Corp., Massapequa, Long Island, New York, herein called

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[1] The name of the Charging Party in Case No. 2-CA-7173 appears as amended at the hearing.

[2] The name of the Party to the Contract in both cases was amended at the hearing to reflect an affiliation which took place March 1, 1960.

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the Respondent, has since on or about January 28, 1960, interfered with, restrained, and coerced its employees in certain specified respects; that since on or about February 3, 1960, it has rendered unlawful assistance and support to Amalgamated Local Union 335, Retail, Wholesale and Department Store Union, AFL-CIO, Party to the Contract, herein called Local 355; that on or about February 15, 1960, during the pendency of a representation proceeding before the National Labor Relations Board, herein called the Board, and at a time when Local 3555 was not the designated bargaining agent of an uncoerced majority of its employees, it entered into an illegal collective bargaining agreement with Local 355; that by entering into, maintaining in effect and enforcing the union security provisions of the said contract since February 15, 1960, it discriminated regarding the hire and tenure of employment of its employees, thereby encouraging membership in Local 355 and discouraging membership in Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Ware-[fol. 12] housemen and Helpers of America, the Charging Party, herein called Local 553; and that since on or about March 21, 1960, it has refused to bargain collectively with Local 553 as the bargaining representative of its employees in an appropriate unit, although Local 553 had, prior thereto, been certified by the Board as the exclusive collective bargaining representative of the employees in the said unit. It is alleged that this conduct violated Section 8(a)(1), (2), (3) and (5) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. After the issuance by the General Counsel [3] of a separate complaint in each case [4] and the filing of separate answers by the Respondent, the cases were consolidated and a consolidated hearing was held before me at New York, New York, on April 18 and 19, 1960. All parties were represented and

[3] The term General Counsel refers to the General Counsel of the National Labor Relations Board and his representative at the hearing.

[4] The complaint in Case No. 2-CA-7173 was amended on March 23, 1960.

participated in the hearing. After the close of the hearing, the Charging Party and the Respondent filed briefs, which have been duly considered.

Upon the entire record in these cases, and from my observation of the witnesses, I make the following:

Findings of Fact

A. *The Board's Jurisdiction*

1. Facts

The Respondent is a New York corporation, with its principal office and place of business in Massapequa, Long Island, New York. It is engaged in the business of selling [fol. 13] fuel oil for heating purposes, and servicing oil burners and boilers. All its customers are homeowners located in the State of New York. During the fiscal year ending June 30, 1959, the Respondent's gross sales exceeded $500,000. During the calendar year 1959 the Respondent purchased from Gulf Oil Corporation, herein called Gulf, fuel oil and related products valued at more than $500,000. Most of the product delivered to the Respondent is refined outside the State of New York and delivered into Gulf's storage tanks at New York, New York. It is then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, New York, without segregation according to customers. The Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to the Respondent's customers, or to the Respondent's tanks at Massapequa, from which it is later withdrawn and delivered to customers. The Respondent also obtains some fuel oil by exchange with other fuel oil companies on Long Island. This operates as follows: The Respondent draws a certain amount of oil from the other firm's tanks; conversely the other firm draws the same amount of oil from the Respondent's tanks. It is a barter operation, without the payment of money. The Respondent has on occasions obtained truck parts directly from outside the State of New York. In 1959, these purchases totaled "a couple of hundred dollars at the most." Other than this, the Respondent made no purchases of any kind directly from outside the State.

Gulf is engaged in the nonretail and retail sale of fuel

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oils and related products. It operates in New York and in other States. Its gross sales and operating revenues in 1959, including consumer excise taxes, amounted to in ex- [fol. 14] cess of $3,170,000,000. The Respondent and the Party to the Contract concede, and I find, that at all material times Gulf was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Contentions and conclusions

The General Counsel and the Charging Party maintain that the Respondent is not only engaged in the retail business, but also in the wholesale business, and that therefore either the retail or the nonretail jurisdictional standards of the Board apply. They based this argument on the exchange of products with other fuel oil firms. Conversely the Respondent, insisting that the exchange arrangement was on a nonprofit basis, simply for convenience, and constituted "but a minute proportion of its overall business," contends that it "could not qualify as a wholesaler," and therefore that the Board's nonretail standard is not applicable.

The Board's current standard for asserting jurisdiction over a retail enterprise which falls within its statutory jurisdiction is a minimum gross annual volume of business of $500,000.[5] This test has been met here. However, in addition to showing that the relevant gross volume test has been satisfied, the record must demonstrate conclusively the existence of *legal* jurisdiction, that is, that the employer involved is engaged in commerce or that his operations affect commerce within the meaning of Section 2 (6) and (7) of the Act.[6] The Respondent and the Party [fol. 15] to the Contract urge that such constitutional or legal jurisdiction is lacking here. The Respondent argues that, while the products purchased by it from Gulf in New

[5] *Caroline Supplies and Cement Co.*, 122 NLRB 88, 89.

[6] *International Longshoremen & Warehousemen's Union, et al. (Catalina Island Sightseeing Lines)*, 124 NLRB No. 103; *Westside Market Owners Association, et al.*, 126 NLRB No. 29; *James D. Jackson, d/b/a Jackson's Party Service*, 126 NLRB No. 101; and *Southwest Hotels, Inc. (Grady Manning Hotel)*, 126 NLRB No. 141.

York might have originated outside the State and been transported across State lines, they had come to rest within the State in Gulf's storage tanks before they passed into the Respondent's hands. In sum, the rationale which the Respondent espouses is that the interstate flow of the goods had already been halted by Gulf within the borders of the State, and whatever happened thereafter was purely an intrastate transaction. I cannot agree. It is enough to find, as I do, that the Respondent in 1959 purchased a substantial amount of fuel oil from Gulf, a company concededly engaged in interstate commerce. Therefore, interstate commerce was affected by the Respondent's operations. And the fact that the goods had come to rest within the State is, in my opinion immaterial.

On the basis of the record I am satisfied, and find, that the test of legal jurisdiction has been met. Accordingly, it is found that, at all material times, the Respondent was engaged in commerce within the meaning of the Act, and its operations meet the Board's jurisdictional standards for the assertion of jurisdiction.[7]

In view of the above finding, I deem it unnecessary to pass upon the General Counsel's additional contention that the nonretail jurisdictional standards are applicable to the [fol. 16] Respondent's operations.[8] As the Board has said: "Where, as here, *legal* jurisdiction has been established *and* some relevant standard for the discretionary assertion of jurisdiction has been met, it is immaterial that jurisdiction might be asserted under one of several different standards." (Emphasis in original.)[9]

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[7] It is noted in passing that, without objection from the Respondent or the Party to the Contract, the Board on December 31, 1959, found that the Respondent was engaged in commerce within the meaning of the Act. *Reliance Fuel Oil Corp.*, Case No. 2-RC-10280, Decision and Direction of Election, not included in bound volumes of Board decisions.

[8] Compare *Pease Oil Company*, 122 NLRB 344, 123 NLRB 660, enfd. F. 2d (C. A. 2), May 26, 1960, 46 LRRM 2286.

[9] *Catalina Island Sightseeing Lines, supra.*

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B. *The Labor Organizations Involved*

The parties agree, the Board has found,[10] and it is now found, that Local 553 and Local 355 are, and at all material times have been, labor organizations within the meaning of Section 2(5) of the Act.

C. *The unfair labor practices*

1. Introduction

The Respondent's business is a seasonal one. In the geographic area in which the Respondent operates, the normal busy season begins in October or November of one year and ends in March or April of the next year; the busiest months are usually January, February and March.

At all material times, Abraham Peckman has been president of the Respondent and Harold Packman has been its secretary-treasurer. It is found that at all material times they were supervisors within the meaning of the Act.

For purposes of this Report, the Respondent has at all material times employed two principal groups of workers: [fol. 17] oil burner service employees, herein called servicemen, numbering about 10; and fuel oil drivers, herein called drivers, approximately 11 in number.[11] Prior to January 27, 1960, the drivers worked full time and received, in addition to their regular pay, a bonus of one-half cent for each gallon of fuel oil delivered in excess of 5,000 gallons in any single day.

2. Events to the end of February 1960

During the winter of 1958, Local 355 made an unsuccessful attempt to organize the Respondent's employees. On September 28, 1959, Local 553 filed with the Board a petition in Case No. 2-RC-10280, seeking to represent a unit of the Respondent's servicemen only. At the request of some of the drivers, a meeting was arranged with a representative

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[10] Case No. 2-RC-10280, Decision and Direction of Election, *supra*.

[11] As used herein, the term drivers applies only to "year round" drivers. We are not here concerned with casual or seasonal drivers.

of Local 553 after working hours one evening in October 1959. The drivers did not appear at the appointed place at the appointed time. Richard Granger, a serviceman in the Respondent's employ, went to the Respondent's shop and found a number of the Respondent's drivers sitting in the office. Packman also was present. Granger asked Packman why the drivers had not come to the meeting which they had requested. Packman replied: "To tell you the truth, I told them not to attend the meeting." Packman also told driver Joseph Mendolia that "it would be better for you if you don't go." [12]

On October 14, 1959, Local 553 filed with the Board an amended petition in Case No. 2-RC-10280 enlarging the [fol. 18] requested unit to embrace drivers as well as servicemen. Local 355 procured signed authorization cards from some of the employees and intervened. On December 31, 1959, the Board directed an election among the Respondent's servicemen and drivers to determine whether they desired to be represented by Local 553, by Local 355, or by neither. During the period before the election, Packman predicted to a group of the Respondent's employees "that Local 553 wasn't going to win the election" and also stated "on numerous occasions" that "there will be a shape-up if we have [Local] 553." [13]

The election was conducted on January 27.[14] There were approximately 21 eligible voters and 21 ballots were cast, of which 10 were for Local 553, 6 for Local 355, 1 was against either union and 4 were challenged. Immediately

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[12] These findings are based upon the credited testimony of Granger and Joseph Mendolia.

[13] These findings are based upon the credited testimony of Granger and Charles Theodore Sammis, Jr., who were both still in the Respondent's employ at the time they testified. See *Paul M. O'Neill International Detective Agency, Inc.* v. *N. L. R. B.*, F. 2d (C. A. 3), 46 LRRM 2503 at 2506. Moreover, they impressed me as candid and forthright witnesses. To the extent that Packman denied these statements, his denials are not credited. He did not impress me as credible. His testimony at times was vague and evasive and he was sometimes uncooperative.

[14] Unless otherwise noted, dates refer to the year 1960.

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after the election the extra-gallonage bonus for drivers, described above, was discontinued by the Respondent. While the record is not entirely clear on this matter, it apparently has never been resumed.

On February 2, the Respondent inaugurated a new "share-the-work" program (sometimes referred to in the record as a "shapeup") among its drivers. This operated as follows: Each night when the drivers came in from their runs, they were told how many trucks and which drivers would be needed the following day. Those who were [fol. 19] informed that they would not be needed the next day did not report for work until the day after. While this system was in effect, the number of drivers working on any given day varied from a full crew of approximately 11 drivers to a minimum number of about 4 drivres. Thus some drivers lost several days of employment. After this system went into effect, Packman told Granger and Sammis (who as servicemen were not directly affected): "You see what's happening to the drivers, and you men haven't been hurt as yet." [15]

The share-the-work program evoked complaints from some of the drivers who were affected by it. When driver Benjamin Mendolia asked Packman why the system had been put into operation, Packman replied: "First of all, it's warm out; and second of all; that's the way [Local] 553 operates." [16] To others Packman explained that as long as a union was coming in, the Respondent was going to follow union rules.[17] Packman summoned driver Donald R. Kershow to his office and stated that the share-the-work program was to give the drivers "a taste of what [Local] 553 would be" if Local 553 became the employees' bargaining representative. He asked Kershow "to get a couple of other drivers [mentioning Joseph Mendolia and Benjamin Mendolia by name] to * * * change the majority of the men going into [Local] 355" and suggested that if a

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[15] This finding is based upon the credited testimony of Granger and Sammis.

[16] This finding is based on Benjamin Mendolia's credited testimony.

[17] This finding is based upon an admission by Peckman while testifying.

petition to that effect were signed and "pushed through different channels" there might be a "re-vote" and previous working conditions might be restored.[18] At about 5 p. m. [fol. 20] on February 3, Packman told driver Vincent Graziano and other employees that the drivers "would get reimbursed for the days that [they] lost" if they would "sign for [Local] 355."[19]

Meanwhile, on February 2, driver Joseph Mendolia had asked Packman why the share-the-work system had been instituted. Packman replied: "That's the way [Local] 553 works." Mendolia inquired "how [he] could get away from it," and Packman suggested that Mendolia contact Murray Flatow, president of Local 355.[20] Mendolia then telephoned to Flatow. As a result Flatow, after consulting Local 355's attorney, had petitions prepared in duplicate which read:

> From the employees of
> Reliance Fuel Corp.
> 500 Hicksville Road
> Massapequa, L. I. N. Y.
>
> To:
>
> Reliance Fuel Corp.
> 500 Hicksville Road
> Massapequa, L. I. N. Y.
>
> GENTLEMEN:
>
> We the undersigned employees representing an overwhelming majority of the employees employed by Reliance Fuel Corp. Do hereby request our employer

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[18] This finding is based upon Kershow's credited testimony. Packman testified that he could not recall the incident.

[19] This finding is based upon Graziano's credited testimony.

[20] This finding is based on Joseph Mendolia's credited testimony. Although he testified that this conversation took place on February 3, it is obvious from the date of the petitions described hereafter that he was mistaken as to the date.

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not to sign an agreement with Local 553 of the Teamsters Union.

[fol. 21] Some of us during the recent election conducted by the N. L. R. B. voted for 553 of the Teamsters Union. We hereby recind (*sic*) such vote having changed our mind concerning our desire to be represented by Local 553 of the Teamsters Union.

Dated February 2, 1960.

Flatow delivered the petitions to Raymond E. Haff, one of the Respondent's employees. They were left on a table in the rear of a room at the Respondent's shop, where they were signed by 16 of the Respondent's drivers and servicemen. There is no evidence that these petitions were circulated directly by any supervisor of the Respondent. After the signatures were affixed, the petitions were returned to Flatow. He retained one copy and mailed the other to the Respondent in an envelope of Local 355; it was received on February 10.

On February 14 Flatow sent a telegram to Packman claiming that Local 335 represented a majority of the Respondent's employees and demanding the negotiation of a collective bargaining contract. On the same day, Flatow telephoned to Packman and arranged a negotiating session for 6 p. m. on February 15. That night (February 14) after working hours, Flatow met with 14 of the Respondent's employees at a place other than the Respondent's shop. None of the Respondent's supervisors attended.

On February 15 Flatow met alone with 18 or 19 of the Respondent's drivers and servicemen at the Respondent's shop from 6 to 6:30 p. m. Then Peckman and Packman came in, and Flatow announced at the outset that Local 355 "wouldn't stand for a shape-up." Packman asked [fol. 22] Flatow to exhibit the cards he had procured from the employees designating Local 355 as their bargaining agent. Flatow complied. Packman did not look through all of them.[21] The record does not indicate how many such

[21] This finding is based upon Flatow's credited testimony. Packman did not testify as to any showing of cards. Peckman denied that he had been shown any cards prior to the signing of the contract.

cards Flatow then had. Negotiation of a collective bargaining contract, with the employees present, was then carried on. At about 10:30 final agreement was reached and a 2-year collective bargaining contract was signed by Flatow for Local 355 and Packman for the Respondent. The employees present were also asked to sign. Three servicemen, Granger, Sammis and Carl Ackerman, approached Peckman, Packman and Flatow. Granger, acting as spokesman, stated that, as the Board had not yet ruled on the challenged ballots, they did not want to sign a contract at this time but preferred to wait for the Board's decision. Packman replied: "What's the matter? Don't you want to work here anymore?"[22] He added that "there was a contract here * * * that the men would work by, and if they weren't members of the union then they couldn't work for the organization."[23] Packman stated that he "would take full responsibility for anything that took place here." All employees present, including Granger, Sammis and Ackerman, signed the contract.

Immediately upon the execution of the contract, the share-the-work program for drivers was abandoned. Moreover, those drivers who had lost work received a lump sum pay-[fol. 23] ment by way of reimbursement. All 21 drivers and servicemen signed cards designating Local 355 as their bargaining agent and authorizing the Respondent to withhold from their wages and remit to Local 355 dues and initiation fees due Local 355. By virtue of these authorizations and a checkoff provision in the contract, the Respondent withheld from the wages of the drivers and servicemen, and remitted to Local 355, a total of $140 during the period February 23 through April 5.

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[22] This finding is based upon the credited testimony of Granger and Sammis. Ackerman and Packman testified that they did not recall this response by Packman.

[23] This finding is based upon an admission by Packman while testifying.

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3. Interference, restraint and coercion

(a) *Contentions of the parties*

The complaint in Case No. 2-CA-7173, as amended, alleges, and the General Counsel contends, that the Respondent interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act in the following specific ways:

1. Threatening its employees with loss of pay on or about January 28, February 1, and February 15, unless they ceased supporting Local 553, and supported Local 355.
2. Offering and promising its employees improvements in their working conditions on or about January 28, February 3, and February 15, to induce them not to support Local 553 and to support Local 355.
3. Changing various working conditions of its employees on or about January 28 and February 15, because they refused to cease supporting Local 553, and because they refused to support Local 355.

[fol. 24] 4. Entering into a collective bargaining contract with Local 355, which recognized Local 355 as the employees' exclusive bargaining agent, on February 15, at a time when Local 355 was not the bargaining agent selected by an uncoerced majority of the Respondent's employees and while a representation proceeding (Case No. 2-RC-10280) was pending before the Board, maintaining and enforcing said illegal contract thereafter, and requiring its employees to pay dues, initiation fees, assessments and fines to Local 355.

5. Warning its employees, on about February 3, not to attend any meetings of Local 553; permitting an agent of Local 355 on the same day to enter its premises and solicit signatures on the petition described above; and having Peckman and Packman attend a meeting of Local 355 on its premises on or about February 15.

The answer in Case No. 2-CA-7173 denies all these allegations, except that it admits that the Respondent and Local 355 executed a collective bargaining agreement on or

about February 15, which recognized Local 355 as the exclusive bargaining agent of the employees, that such contract has since been enforced and maintained, and that an agent of Local 355 entered the Respondent's premises on or about February 3.

(b) *Threats of reprisal*

It is found that the following conduct of the Respondent's supervisors constituted threats of reprisal against the em- [fol. 25] ployees should they support Local 553 or refuse to support Local 355, in Violation of Section 8(a)(1) of the Act:

1. Packman's numerous statements to a group of employees in January that "there will be a shape-up if we have [Local] 553."
2. Packman's statement to servicemen Granger and Sammis, after the share-the-work program for drivers began on February 2, that "You see what's happening to the drivers, and you men haven't been hurt as yet." This inherently implied that, if the servicemen persisted in supporting Local 553, they too would suffer.
3. Packman's statements to drivers Benjamin Mendolia, Joseph Mendolia and Kershow, on about February 2 or 3, that the share-the-work plan was instituted because "that's the way [Local] 553 operates" and to give the drivers "a taste of what [Local] 553 would be." These clearly implied that the system was punitive and would remain in effect so long as the employees supported Local 553.[24]
4. Packman's reply to servicemen Granger, Sammis and Ackerman when they hestitated to sign the contract with Local 355 on February 15: "What's the matter? Don't you want to work here anymore?" and his further statement that "if they weren't members of the Union then they couldn't work," both of which clearly threatened discharge for failure to sign the contract and join Local 355.

[24] Compare *Keil Company,* 117 NLRB 828, 829.

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[fol. 26] (c) *Promises of benefit*

The record reveals specific instances of promises of benefit made by officials of the Respondent to its employees if they would change their allegiance from Local 553 to Local 355, in violation of Section 8(a)(1) of the Act, as follows:

1. Packman's statement to driver Graziano and other employees, about February 2 and 3, that they would be reimbursed for lost days if they would "sign for [Local] 355."
2. Packman's reply, when asked by driver Joseph Mendolia on February 2 how he could avoid the share-the-work program, suggesting that Mendolia contact Flatow, president of Local 355. This constituted a clear indication that the price for relief from the burdensome share-the-work system was adherence to Local 355.
3. Packman's suggestion to driver Kershow, on February 2 or 3, that he circulate a petition to aid Local 355, which might result in a restoration of previously existing working condition, *e.g.* the abandonment of the share-the-work plan.[25]

(d) *Changes in working conditions*

On about January 27, the Respondent discontinued the previously-existing extra-gallonage bonus for drivers and, on February 2, instituted for the first time a share-the-work system for its drivers. Both these changes in working conditions—which took place shortly after the election—worked [fol. 27] to the disadvantage of the drivers. On February 15, after the signing of the contract with Local 355, there were further changes—the share-the-work plan was abandoned and the drivers who had lost time thereby were reimbursed. These two changes constituted the granting

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[25] I base no finding of unfair labor practices upon Packman's prediction in January that Local 553 would lose the election.

of benefits to the drivers by restoring them to their previous working conditions.[26]

With respect to the institution of the share-the-work system for drivers on February 2, which the General Counsel and the Charging Party contend was discriminatorily motivated, the Respondent maintains that this was due solely to economic necessity. In support of this defense, the Respondent introduced evidence tending to show that, due to unusually warm weather during December 1959 and January 1960, its business fell off 20 percent and it did not care to risk the loss of drivers by laying any of them off; further that it restored the drivers to full-time work when the weather again turned cold in February.

Let us consider, first of all, the latter two changes. In *American Freightways Co., Inc.*, the Board set forth a test for determining whether an employer's granting of economic benefits to his employees violated Section 8(a)(1) of the Act. It there stated:

> the test * * * does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.[27]

[fol. 28] Bearing this test in mind, it is significant that the share-the-work program was discontinued and the drivers reimbursed for lost time as soon as the contract with Local 355 had been signed. When viewed in the context of the Respondent's earlier indications that these measures would result if the employees would switch from Local 553 to Local 355, the conclusion is inescapable that the drivers normally would conclude that they were being rewarded for submitting to the Respondent's expressed

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[26] At oral argument, the General Counsel contended that the Respondent had discontinued "overtime pay" of its drivers immediately after the election. I find no probative evidence to support this contention.

[27] 124 NLRB No. 1. In *True Temper Corporation*, 127 NLRB No. 106, this test was further discussed. In my opinion, nothing said in *True Temper* altered or modified the test laid down in *American Freightways*.

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desire as to their union adherence. Without regard to the Respondent's motives, I conclude that the granting of these benefits reasonably and naturally tended to interfere with the free exercise of the employees' rights, and therefore violated Section 8(a)(1) of the Act.

Let us turn now to the two changes made on January 27 and February 2, which were detrimental rather than beneficial changes. I perceive no reason why the same test—that laid down in *American Freightways*—should not apply equally to less favorable changes as applies to the granting of benefits. The discontinuance of the extra-gallonage bonus for drivers was timed immediately after the election, the results of which indicated the possibility that a majority of employees might have chosen Local 553 as their bargaining agent. Moreover, at the time the Respondent offered to the effected drivers no explanation for this action. Under these circumstances, and in the background of the Respondent's admitted and known hostility to Local 553,[28] the drivers normally would assume that this conduct was designed [fol. 29] to punish them for their support of Local 553 in the election, and to induce them to change their affiliation. It would also be natural for the drivers to conclude that the share-the-work program was instituted for the very same reason, especially in view of its timing within a week after the election, and Packman's numerous statements before then that there would be a "shape-up" if Local 553 came in. Any lingering doubts on this score would normally have been dispelled by Packman's statements to Kershow and the Mendolias that the plan was inaugurated to afford the drivers "a taste of what [Local] 553 would be." I conclude, entirely aside from the Respondent's purpose, that these changes in working conditions reasonably tended to interfere with the free exercise of the employee's rights, in violation of Section 8(a)(1) of the Act.

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[28] Peckman testified that he had stated "that I did not like the Teamsters Union [Local 553] for ethical reasons." Reference is also made to Packman's attempt in October 1959, described above, to keep the drivers from attending a meeting conducted by Local 553.

(e) *Legality of the contract of February 15*

The complaint in Case No. 2-CA-7173 alleges, and the General Counsel maintains, that the collective bargaining agreement entered into between the Respondent and Local 355 on February 15, which recognized Local 355 as the exclusive bargaining agent of the employees, and any modification, supplement, renewal or extension thereof, is "invalid and in violation of the Act." The General Counsel bases this contention on two factors: (1) that Local 355 was not then, and never has been, the collective bargaining agent of an uncoerced majority of the Respondent's employees; and (2) that at the time representation proceedings were pending before the Board. The Respondent's answer in Case No. 2-CA-7173, although admitting the execution of the contract, denies its illegality.

[fol. 30] The result of the election held on January 27 demonstrates that, no matter how the challenges would be determined, the largest number of votes Local 355 could have received would have been 10 (6 plus the 4 challenged ballots) of a total of 21 valid ballots cast.[29] It is unquestionably clear, therefore, that Local 355 had not, on January 27, been designated by a majority of the employees.[30] And a state of affairs once shown to exist is presumed to continue.[31] Therefore, unless the contrary is shown, Local 355 did not represent a majority of the Respondent's employees

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[29] Assuming that all the challenged ballots were cast for Local 355, had all 4 challenges been overruled, Local 355 would only have had 10 votes out of 21; had 3 been overruled and 1 sustained, Local 355 would have had 9 votes out of 20; had 2 been overruled and 2 sustained, 8 out of 19; had 1 been overruled and 3 sustained, 7 out of 18; and had all 4 been sustained, 6 out of 17.

[30] If all 4 challenges had been overruled, and all had been cast for Local 355, the vote would have stood 10-10-1, and a runoff election between Local 553 and Local 335 might have resulted under Section 102.70 of the Board's Rules and Regulations, Series 8. However, the bare possibility of a future victory in a runoff election cannot be equated to a presently-existing majority.

[31] *Bordo Products Company,* 117 NLRB 313, 314.

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on February 15. The Respondent contends, however, that the intervening voluntary act of 16 of the 21 employees in signing their names to the petitions, 1 copy of which it received on February 10, demonstrates that Local 355 achieved a majority status in the period between January 27 and February 10. Indeed, during this period, as the Charging Party aptly described it, the employees "wavered in their union sympathies like straws in the wind." And it is true, as the Respondent points out, that the petitions were not circulated *directly* by any agent of the Respondent. But any evaluation of the true nature of the conduct of the 16 employees who signed cannot stop there. The entire context in which the event occurred must be considered.

[fol. 31] It has been found above that the Respondent engaged in numerous acts of interference, coercion and restraint designed to influence its employees to select Local 355, rather than Local 553, as their bargaining representative. These included suggesting to Kershow that the men sign the very type of petition they eventually did sign, coupled with an intimation that they would then be rewarded by restoration of previous working condition; a promise of reimbursement to Graziano and others if they would "sign for [Local] 355"; and a suggestion to Joseph Mendolia that, to avoid further share-the-work, he should contact Local 355's president. This latter conduct by one of the Respondent's officials resulted indirectly in the preparation of the petitions and their submission to the employees for signature. And two of the drivers, Kershow and Benjamin Mendolia, testified that they signed the petitions in order to end the onerous share-the-work program. Viewed in the light of these circumstances, I am convinced that the signing of these petitions by the employees was not a voluntary act on their part, but on the contrary was the fruit of a campaign of deliberate coercion carried on by the Respondent. Accordingly, the petitions do not indicate any genuine change of heart by the employees and are a nullity. Finally, the Respondent points to the signature of 19 of the 21 employees on the contract itself. But these, too, were obtained as the result of the Respondent's coercion—particularly the signatures of Granger, Sammis and Ackerman. It is therefore clear that the presumption of Local 355's lack of

majority on February 15, stemming fro mits demonstrated lack of majority on January 27, has not been rebutted. As Local 355 had not been chosen by a majority of the em- [fol. 32] ployees on February 15,[32] it was a violation of the Act for the Respondent to extend exclusive recognition to Local 355 on that date.[33]

There is another reason why the execution of the contract was a violation of the Act: The time was inappropriate. When Local 553 filed with the Board its petition in Case No. 2-RC-10280, this raised a genuine question concerning the representation of the Respondent's employees, which question was still pending undetermined before the Board on February 15. The Respondent, of course, knew this. It has been held that it is a violation of the Act for an employer to recognize either of two competing unions under such circumstances, for the employer thereby illegally arrogates to himself the resolution of the representation dispute, encroaches upon the Board's exclusive domain, and disrupts the orderly representative procedure established under the Act.[34] This Respondent however, argues that, notwithstanding pending certification proceedings, an employer must bargain with the union of his employees' choice. For this proposition it cites several court deci-

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[32] The fact that all the employees signed designation cards on behalf of Local 355 *after* the contract was signed is immaterial. *International Ladies' Garment Workers' Union, AFL-CIO v. N. L. R. B.*, F. 2d (C. A., D. C.) 46 LRRM 2223, footnote 3.

[33] *N. L. R. B. v. Revere Metal Art Co., Inc., et al.*, 123 NLRB 114, enf. F. 2d (C. A. 2), 46 LRRM 2121, 2123, 2452; *Dixie Bedding Manufacturing Company v. N. L. R. B.*, 268 F. 2d 901, 905 (C. A. 5); and *International Ladies' Garment Workers' Union, AFL-CIO v. N. L. R. B., supra*, at 2225, and cases cited in footnote 6 therein.

[34] *Midwest Piping & Supply Co.*, 63 NLRB 1060; *Shea Chemical Corporation*, 121 NLRB 1027; *Halben Chemical Co., Inc.*, 124 NLRB No. 116, enfd. as modified (C. A. 2), 46 LRRM 2128; and *Burke Oldsmobile, Inc.*, 128 NLRB No. 12.

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sions.[35] But the Board's well-settled doctrine described [fol. 33] above provides for no exception where, by happenstance, the union recognized by the employer actually turns out to be the one with majority status. To the extent that any cases cited by the Respondent might be read as disagreeing with the Board's doctrine, as a Trial Examiner I must, with due respect for the courts which decided them, decline to be bound thereby until the Board or the United States Supreme Court holds to the contrary.[36] Moreover, in the cases cited by the Respondent, the recognized union had been freely chosen by a majority of the employees before recognition. This was not true here. It is accordingly found that, by executing the contract of February 15 recognizing Local 355 as the exclusive bargaining agent of its employees, the Respondent interfered with, coerced and restrained its employees in violation of Section 8(a)(1) of the Act.

(f) *Miscellaneous*

(i) Warning employees not to attend Local 553 meetings

As noted above, *in October 1959* Packman warned the Respondent's drivers not to attend a meeting conducted by Local 553. This incident was not alleged in the complaint, and the General Counsel stated at the hearing that the testimony in regard thereto was introduced "for background material to show animus." Accordingly, no finding of unfair labor practice will be based thereon. The record does not contain any evidence to support the allegation of the [fol. 34] complaint in Case No. 2-CA-7173 that the Respondent, "on or about February 3, 1960, * * * warned its employees not to attend any meetings conducted by Local 553."

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[35] *E.g.: Cleaver-Brooks Mfg. Corporation v. N. L. R. B.*, 264 F. 2d 637 (C. A. 7); *N. L. R. B. v. Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (C. A. 7); and *N. L. R. B. v. Standard Steel Spring Co.*, 180 F. 2d 942 (C. A. 6).

[36] *Novak Logging Company*, 119 NLRB 1573; and *Scherrer and Davisson Logging Company*, 119 NLRB 1587. See also *Shea Chemical Corporation, supra*, footnote 10 of Intermediate Report therein.

(ii) Permitting Local 355's agent to enter the Respondent's premises

The answer in Case No. 2-CA-7173 admits that an agent of Local 335 entered the Respondent's premises on or about February 3. However, there is no evidence that this entry was pursuant to any consent given by the Respondent. Nor does the record reveal the purpose for the visit. It is true that Flatow testified that on or about February 3 he turned over the unsigned petitions to Haff, but the record does not show the place of delivery. Hence there is no proof to support the allegation of the complaint in Case No. 2-CA-7173 that the Respondent permitted the entry, or that the purpose was to "solicit the signatures of [the] Respondent's employees on a petition requestiong [the] Respondent not to sign an agreement with Local 553."

(iii) Attendance of Peckman and Packman at Local 355's meeting

Although Peckman and Packman were probably at the Respondent's shop between 6 and 6:30 p. m. on February 15, they did not attend the meeting called by Flatow there. They were not called in until 6:30 p. m., after that meeting had ended and negotiations for a contract were about to begin. Hence there is no evidence to support the allega-
[fol. 35] tion of the complaint in Case No. 2-CA-7173 that on that date they "attended and participated in a meeting of [the] Respondent's employees * * * at its premises, conducted by Local 355."

4. Assistance to and support of Local 355

The complaint in Case No. 2-CA-7173 alleges, and the answer therein denies, that by the same conduct of the Respondent which allegedly constituted interference, restraint and coercion of employees in violation of Section 8(a)(1) of the Act, the Respondent likewise rendered unlawful assistance and support to a labor organization in violation of Section 8(a)(2) of the Act.

It has been found above that the Respondent threatened its employees with reprisals unless they ceased supporting Local 553, and supported Local 355; promised them benefits if they would switch their affiliation from Local 553 to Lo-

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cal 355; changed the drivers' working conditions to their detriment under circumstances which reasonably would lead them to believe that they were being punished for their adherence to Local 553; and granted the drivers benefits in a context which normally would cause them to infer that they were being rewarded for changing their allegiance from Local 553 to Local 355. By such conduct, the Respondent accorded to Local 355 illegal assistance and support. The Respondent also on February 15 executed a contract with Local 335, recognizing that union as the exclusive representative of the employees, under circumstances which made such action illegal. In this connection, it is significant that this was accomplished without any genuine effort to [fol. 36] examine or count the cards in Flatow's possession, but soley in reliance upon 16 signatures on a petition which had resulted from the Respondent's prior coercion. And the Respondent's efforts to foist Local 335 upon its employees did not end there. It coerced at least three servicemen into signing the contract itself under threat of discharge, thereafter maintained and enforced the contract, establishing membership in Local 355 as a condition of employment, and deducted union dues from its employees' wages and remitted these funds to Local 355. Thereby the Respondent rendered further illegal aid and assistance to Local 355. I conclude that such conduct, in addition to violating Section 8(a)(1) of the Act, was proscribed by Section 8(a)(2) of the Act.

5. Discrimination

The contract of February 15 between the Respondent and Local 355 contained the following clause:

> All present and future employees covered by this Agreement shall, on *or after* the thirtieth (30th) day following the beginning of such employment or the effective date of this agreement, whichever is later, join the Union and shall thereafter remain members of the Union as a term and condition of employment. (Emphasis supplied.)

The General Counsel contends that by including in the contract such a clause "which required membership in Local 355," the Respondent "discouraged membership in

Local 533 [and] encouraged membership in Local 355" and thus violated Section 8(a)(1) and (3) of the Act.
[fol. 37] Of a similarly-worded clause, the Board said in *Kaiser Aluminum & Chemical Corporation:*

> Read literally, this quoted provision might be taken to mean that an employee satisfied the requirement of the provision by joining the union at *any time* during the term of the agreement, even after a lapse of 30 days or more following the date of employment, because it does not say how long "after" the thirtieth day the obligation attaches. On the other hand, the provision might be interpreted to mean that employees subjected themselves to discharge for nonmembership in the Union on or immediately after the thirtieth day following the date of their employment. In view thereof, we conclude that the contract is ambiguous. Recourse must be had therefore to the practice under the contract to determine the intent of the contracting parties as to the meaning of the union-security provision. (Emphasis in original.)[37]

Applying this test to the instant case, the practice under the contract must be evaluated to determine whether the parties intended to require union membership on or before March 16, 1960, on the one hand, or on or before February 14, 1962, on the other. There is no evidence that any applicant or employee was instructed in this regard, or that Local 355 sought the discharge of any employee after March 16. However, every employee covered by the contract joined Local 355 before March 16.[38] From this I conclude that the parties intended the deadline to be March 16, 1960, rather than February 14, 1962.
[fol. 38] With respect to the legality of this clause, as so interpreted, under Section 8(a)(3) of the Act, the United

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[37] 98 NLRB 753, 754.

[38] With the possible exception of Donald R. Kershow, whose undated card was admitted in evidence, with the others, at the hearing on April 19.

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States Court of Appeals for the Second Circuit has said of a similar provision:

> Such an agreement is permitted *inter alia,* only when the labor organization is "not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice" and when it "is the representative of the employee[s] as provided in Section 9(a)," and Section 9(a) requires that the representative be "designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes." The agreement here failed on both counts.[39]

It is accordingly found that the Respondent had no legal right on February 15 to include such a union-security provision in its contract with Local 355 because Local 355 was not then the bargaining representative of a majority of the covered employees, and also because Local 355 was the recipient of illegal aid and support. Furthermore, the Respondent could not legitimately thereafter maintain and enforce this provision, or require its employees to pay dues to Local 355.[40] By such conduct, the Respondent discriminated regarding the terms and conditions of employment of its employees, thereby discouraging membership in Local 553 and encouraging membership in Local 355, in contravention of Section 8(a) (3) of the Act. It also interfered with, restrained and coerced its employees in violation of Section 8(a)(1) of the Act.

[fol. 39] The General Counsel, by amendment of the complaint in Case No. 2-RC-7173 at the hearing, and in oral argument, contends that the Respondent further violated Section 8(a)(3) of the Act by instituting changes in the working conditions of its employees on January 27, February 2 and February 15, as described above. Such changes have already been found to have been violative of Section 8(a)(1) of the Act. Whether considered as violations of

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[39] *N. L. R. B.* v. *Revere Metal Art Co., Inc., et al., supra.*

[40] I find no evidence to support the General Counsel's contention that the Respondent required its employees to pay initiation fees, assessments or fines to Local 355.

Section 8(a)(1) or of Section 8(a)(3) or of both, the recommended remedial order regarding such violations would be the same. I therefore deem it unnecessary to determine whether the Respondent additionally violated Section 8(a)(3) of the Act in this respect.

Local 553 maintains that, during the share-the-work program which was in existence from February 2 to 15, the Respondent allocated the available work "on the basis of union sympathies," *i.e.*, discriminated among the drivers in favor of Local 355's adherents and against those supporting Local 553. The General Counsel contends that Kershow was discriminated against in the assignment of available work during this period because of his pro-Local 533 sympathies, in violation of Section 8(a)(3) of the Act. Conversely, the Respondent denies any discrimination and insists that the available work was assigned in accordance with seniority, except for one driver specially qualified to operate a large tractor trailer. I consider it unnecessary to resolve this issue because (1) the matter is not covered in either complaint, and (2) as all wages lost by virtue of the share-the-work system have been restored to the affected drivers, the General Counsel seeks no backpay reim- [fol. 40] bursement. Hence the recommended remedial order cannot be affected by determination of this matter.

6. Refusal to bargain

(a) *The appropriate unit*

The complaint in Case No. 2-CA-7280 alleges, and the answer in that case denies, that all oil burner service employees and fuel oil drivers employed by the Respondent, excluding office clerical employees, salesmen and supervisors, as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining. This is the unit found appropriate by the Board in Case No. 2-RC-10280. I find it to be an appropriate unit.

(b) *Local 553's majority status*

On February 26 the Regional Director issued his Report on Challenges in Case No. 2-RC-10280, in which he recommended that two challenges be sustained and two be over-

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ruled. As the two ballots, the challenges to which he recommended be sustained, could not affect the results of the election if the other two were overruled, he recommended that Local 553 be certified. No exceptions were filed to this report. Accordingly, on March 15 the Board issued its Supplemental Decision and Certification of Representatives adopting the Regional Director's Report on Challenges, and certifying Local 553 as the exclusive bargaining representative of the employees in the unit. It is therefore found that, at all times since January 27, 1960, Local 553 has been and now is the exclusive representative of all employees in the unit described above for purposes of collective bargaining.

[fol. 41] (c) *The Respondent's refusal*

On March 16 Local 553's attorney wrote to Packman, pointing out that Local 553 had been certified by the Board as the bargaining agent for the Respondent's drivers and servicemen and requesting a meeting to negotiate a contract. On March 21 the Respondent's attorney replied, declining to comply with Local 553's request on the ground that the Respondent had executed a contract with Local 355, which was described as "a union of [the employees'] choosing." There has apparently been no further communication between the Respondent and Local 553 regarding bargaining. Thereafter the Respondent continued to recognize and deal with Local 355 as the exclusive bargaining agent of the employees in the unit.

The General Counsel contends that such conduct violated Section 8(a)(1) and (5) of the Act. The Respondent, conversely, maintains that it was justified in refusing to bargain with Local 553 because, prior to Local 553's demand for recognition, Local 355 had attained a majority status, upon the basis of which the Respondent had recognized and dealt with Local 355 as the employees' exclusive bargaining agent.

In this connection, it has already been found that Local 355 was never designated by an uncoerced majority of the Respondent's employees to represent them in bargaining, and that the contract between Local 355 and the Respondent is invalid. Hence the Respondent's argument that Local 355 was freely chosen by a majority of the employees

cannot stand. Furthermore, even assuming, contrary to the above, that a majority of the employees had volun-[fol. 42] tarily switched their allegiance from Local 553 to Local 355 after January 27, this would be no defense. In the interests of stability in bargaining relations, the Board and the courts have held that a bargaining agent freely selected by a majority of the employees in a valid secret election conducted by the Board, as Local 553 was here, cannot be unseated for a reasonable period thereafter (usually a year), notwithstanding a genuine change of heart by the employees.[41] It is accordingly found that, by refusing on March 21, and at all times since, to bargain with Local 553 as the exclusive representative of the employees in the appropriate unit described above, by thereafter recognizing Local 355 as such representative, and by ignoring the Board's valid certification of Local 553, the Respondent has refused to recognize and bargain collectively with the union of its employees' choice, in violation of Section 8(a)(5) of the Act. By such conduct, the Respondent also interfered with, restrained and coerced its employees, in violation of Section 8(a)(1) of the Act.

Upon the basis of the above findings of fact and upon the entire record in these cases, I make the following:

Conclusions of Law

1. Reliance Fuel Oil Corp. is, and at all material times has been, an employer within the meaning of Section 2 (2) of the Act.

2. Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oilburner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, [fol. 43] Chauffeurs, Warehousemen and Helpers of America, and Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, are, and at all material times have been, labor organizations within the meaning of Section 2(5) of the Act.

3. All oil burner service employees and fuel oil drivers employed by the Respondent, excluding office clerical employees, salesmen and supervisors as defined in the Act,

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[41] *Ray Brooks* v. *N. L. R. B.*, 348 U. S. 96, and *Marcus Trucking Company, Inc.*, 126 NLRB No. 131.

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constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-burners Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was, on January 27, 1960, and at all times since has been, the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By rendering illegal assistance and support to Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(2) of the Act.

6. By discriminating in regard to the hire and tenure of employment of its employees, thereby discouraging membership in Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and encouraging membership in Amalga-[fol. 44] mated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

7. By refusing on March 21, 1960, and at all times since, to bargain collectively with Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of the employees in the above-described unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. By the above-described conduct, and by other conduct interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

9. The above-described unfair labor practices tend to lead to labor disputes burdening and obstructing commerce

and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. The General Counsel has failed to prove the allegations of the complaint in Case No. 2-CA-7173 that the Respondent violated the Act by warning its employees, on or about February 3, not to attend any meetings conducted by Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-burner Installation, Maintenance Servicemen and Helpers, Local [fol. 45] Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; by permitting an agent of Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, on the same day to enter its premises and solicit signatures on a petition; and by permitting its officials to attend a meeting conducted by the last-named labor organization, on its premises, on or about February 15, 1960.

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in these cases, I make the following:

Recommendations

It has been found that the Respondent engaged in numerous acts of interference, coercion and restraint designed to influence its employees to select Local 355, rather than 553, as their bargaining representative. It will accordingly be recommended that the Respondent cease and desist from such conduct, and from rendering illegal aid or assistance to any union. It will further be recommended that the Respondent cease and desist from performing or giving effect to its contract of February 15, 1960, with Local 355, or to any modification, extension, supplement or renewal thereof, and from recognizing Local 355, or any successor thereto, as the bargaining representative of any of its employees, unless and until Local 355 has been certified by the Board as such representative.[42] Nothing contained herein shall, however, be construed as requiring the Respondent to abandon or vary the substantive features of the relation- [fol. 46] ship between the Respondent and its employees which have been established pursuant to such agreement.

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[42] *Bowman Transportation, Inc.*, 120 NLRB 1147.

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It has also been found that the Respondent included in its contract of February 15, 1960, with Local 355, an illegal clause requiring, as a condition of employment, that its employees join or maintain their membership in Local 355. It will accordingly be recommended that the Respondent cease and desist from entering into or enforcing any contract or arrangement of such a nature, except as permitted by Section 8(a)(3) of the Act.

Because of the underlying purpose and tendency of this unlawful conduct, danger exists that the Respondent will in the future commit other unrelated unfair labor practices. Accordingly, it will be recommended that the Respondent cease and desist, not only from the unfair labor practices found, but also from in any other manner infringing upon the rights guaranteed in Section 7 of the Act.

Affirmatively, it will be recommended that the Respondent withdraw and withhold all recognition from Local 355 as the representative of its employees in the above-described unit for the purposes of collective bargaining, unless and until Local 355 has been certified by the Board as such representative. It will also be recommended that the Respondent, upon request, bargain collectively with Local 553 as the exclusive representative of the Respondent's employees in the appropriate unit with respect to wages, hours, and other conditions of employment, and embody any understanding reached in a signed contract.

It has further been found that the Respondent unlawfully withdrew the extra-gallonage bonus for its drivers, and [fol. 47] instituted a share-the-work program which caused them loss of earnings. However, they have already been reimbursed for wages lost because of the imposition of the share-the-work system, and no further affirmative remedy is therefore necessary in that respect. With regard to the bonus, it will not be recommended that it be restored to the drivers, because in my opinion the purposes of the Act would better be effectuated by reserving that matter for determination in the collective bargaining which it has been recommended that the Respondent conduct with Local 553.

The complaint in Case No. 2-CA-7173 alleges that the Respondent has required its employees to pay to Local 355 dues, initiation fees, assessments, fines, and other monies

while maintaining and enforcing the illegal agreement of February 15, 1960. It has been found that this was true insofar as dues are concerned. Thus, the General Counsel seeks the familiar *Brown-Olds* remedy.[43] In view of the Respondent's campaign of intimidation and coercion designed to force its employees to abandon Local 553 and to shift their support to Local 355, and the Respondent's other illegal aid and assistance to Local 355, it is reasonable to assume, and I find, that a substantial number of the Respondent's employees joined Local 355 and paid dues to it as a result of that union being foisted upon them by the Respondent's illegal conduct. Accordingly, the application of the remedy sought by the General Counsel would seem to be particularly appropriate here. It will therefore be recommended that the Respondent reimburse all its em-[fol. 48] ployees and former employees for dues paid by them to Local 355 on or after February 15, 1960.[44] It will further be recommended that the Respondent make available to the Board or its agents, upon request, all records necessary to compute the amount of reimbursement due under the terms of this recommended order, and post appropriate notices.

Finally, it will be recommended that the complaint in Case No. 2-CA-7173 be dismissed, insofar as it alleges that the Respondent engaged in the conduct described in Conclusion of Law No. 10, *supra*.

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[43] *United Association of Journeymen & Apprentices of Plumbing & Pipefiting Industry of the United States and Canada, Local 231, AFL-CIO (J. S. Brown-E. F. Olds Plumbing & Heating Corporation)*, 115 NLRB 594.

[44] *N. L. R. B.* v. *Revere Metal Art Co., Inc., et al., supra; Paul M. O'Neill International Detective Agency, Inc.* v. *N. L. R. B.*, F. 2d (C. A. 3), 46 LRRM 2503; *N. L. R. B.* v. *United States Steel Corporation (American Bridge Division), et al.*, F. 2d (C. A. 3), 45 LRRM 3121, 46 LRRM 2205; and *Marcus Trucking Company, Inc., supra.* To the extent that *The Standard Transformer Company*, 97 NLRB 669, enf. 202 F. 2d 846 (C. A. 6), holds to the contrary, I consider that it has now been overruled *sub silentio* by the Board's *Brown-Olds* decision.

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It is therefore recommended that Reliance Fuel Oil Corp., Massapequa, New York, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Threatening its employees with reprisals, or promising them benefits, to encourage or discourage membership in any labor organization;

(b) Establishing, promulgating, instigating or putting into effect any change in the conditions of employment of its employees under such circumstances as reasonably tends to interfere with the free exercise of their rights under the Act;

(c) Enforcing, maintaining, performing or giving effect to its agreement of February 15, 1960, with Amal- [fol. 49] gamated Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, or any modification, extention, renewal or supplement thereto;

(d) Rendering illegal aid or assistance to the above-named labor organization, or any other labor organization;

(e) Recognizing the above-named labor organization, or any successor thereto, as the representative of any of its employees for the purposes of collective bargaining with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, unless and until such labor organization shall have been certified by the Board as the representative of the said employees;

(f) Encouraging or discouraging membership in any labor organization by entering into, enforcing, maintaining, performing or giving effect to any contract, agreement, arrangement or understanding whereby its employees are required to join, or maintain their membership in, any labor organization as a condition of employment, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959; and

(g) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights under Section 7 of the Act, except as authorized in Section 8(a)(3) of the Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action, which I find will effectuate the policies of the Act:

[fol. 50] (a) Withdraw and withhold all recognition from Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, as the representative of any of its employees in the appropriate unit described below for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until the said labor organization shall have been certified by the Board as the representative of the said employees;

(b) Upon request, bargain collectively with Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of its employees in the appropriate unit described below with respect to grievances, labor disputes, wages, rates of pay, hours of employment, or other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

> All oil burner service employees and fuel oil drivers employed by Respondent, excluding office clerical employees, salesmen and supervisors as defined in the Act, as amended;

(c) Reimburse its employees and former employees in the above-described unit for all dues paid to Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, on or after February 15, 1960;

(d) Upon request, make available to the Board or its agents, for examination and copying, all records neces- [fol. 51] sary to analyze and compute the amount of reimbursement due under the terms of this recommended order;

(e) Post at its office at Massapequa, New York, copies of the notice attached hereto, marked "Appendix." Copies of the said notice, to be furnished by the Regional Director for the Second Region, shall, after being duly signed by the Respondent's representative, be posted by

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it immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that these notices are not altered, defaced, or covered by any other material; and

(f) Notify the said Regional Director, in writing, within twenty (20) days from the receipt of this Consolidated Intermediate Report, what steps it has taken to comply with the foregoing recommendations.

It is further recommended that, unless the Respondent shall, within twenty (20) days after the receipt of this Consolidated Intermediate Report, notify the said Regional Director in writing that it will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take such action.

It is further recommended that the Complaint in Case No. 2-CA-7173 be dismissed, insofar as it alleges that the Respondent, on or about February 3, warned its employees not to attend any meetings conducted by Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Ware-[fol. 52] housemen and Helpers of America; permitted an agent of Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, on the same day to enter its premises and solicit signatures on a petition; and permitted its officials to attend a meeting conducted by the last-named labor organization on its premises on or about February 15, 1960.

Dated at Washington, D. C., this 29th day of July 1960.

Sydney S. Asher, Jr., Trial Examiner.

Appendix

Notice to all Employees

Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, you are notified that:

We Will Not threaten our employees with reprisals, or promise them benefits, to encourage or discourage membership in any union.

We Will Not change the working conditions of our employees under such circumstances as reasonably tends to interfere with the free exercise of their rights under the National Labor Relations Act.

We Will Not give effect to our agreement of Febru- [fol. 53] ary 15, 1960, with Amalgamated Local Union, 355, Retail, Wholesale and Department Store Union, AFL-CIO, or any modification, extension, renewal or supplement thereto.

We Will Not render illegal aid or assistance to the above-named union, or any other union.

We Will Not recognize the above-named union, or any of its successors, as the representative of any of our employees for the purpose of collective bargaining with respect to wages, hours or other working conditions, unless such union is certified by the National Labor Relations Board as the representative of such employees.

We Will Not encourage or discourage membership in any union by entering into or giving effect to any contract or understanding whereby our employees are required to join, or maintain their membership in, any union as a condition of employment, except as permitted in Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

We Will Not in any other manner interfere with, restrain or coerce our employees in the exercise of

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their rights to self-organization, to form, join or assist any union, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that this right may be affected by an agreement requiring membership in a union as a condition of employment, [fol. 54] as permitted in Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

We Will withdraw and withhold all recognition from the above-named union as the representative of any of our employees in the appropriate unit described below for the purpose of dealing with us concerning wages, hours and other working conditions, unless such union is certified by the National Labor Relations Board as the representative of such employees.

We Will bargain collectively upon request with Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-Burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the exclusive representative of our employees in the appropriate unit described below with respect to wages, hours and other working conditions, and if an agreement is reached, put it in the form of a signed contract. The appropriate unit is:

> All our oil burner service employees and fuel oil drivers, excluding office clerical employees, salesmen and supervisors.

We Will reimburse our employees and former employees in the above-described unit for all dues paid to Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO, on or after February 15, 1960.

[fol. 55] All our employees are free to become, remain, or refrain from becoming or remaining, members of any union, except to that extent that this right might be affected by an

agreement in conformity with Section 8(a)(3) of the National Labor Relations Act, as modified by the Labor Management Reporting and Disclosure Act of 1959.

Reliance Fuel Oil Corp. Employer.

Dated ——, —— By ——, ——.
Representative Title.

This notice must remain posted for sixty (60) days from the date it bears, and must not be altered, defaced, or covered by any other material.

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[fol. 56] BEFORE THE NATIONAL LABOR RELATIONS BOARD
SECOND REGION

RELIANCE FUEL OIL CORP., and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, COAL, GASOLINE, FUEL OIL LOCAL 553, and AMALGAMATED LOCAL UNION 355, Party to the Contract

Case Nos. 2-CA-7173, 2-CA-7280.

STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF APRIL 18, 1960

745 Fifth Avenue,
New York, New York.

Met, pursuant to notice, at 9:50 o'clock a. m.
Before: Sydney S. Asher, Jr., Trial Examiner.

APPEARANCES:

Bertram T. Kupsinel, Esq., 745 Fifth Avenue, New York, N. Y., appearing on behalf of the General Counsel.

Samuel H. Borenkind, Esq., 135 Broadway, New York, N. Y., appearing on behalf of the Employer.

[fol. 57] Cohen & Weiss, Esqs., By: Herbert A. Levy, Esq., 50 East 42nd Street, New York, N. Y., appearing on behalf of the Charging Party.

Alexander Eltman, Esq., 350 Fifth Avenue, New York, N. Y., appearing on behalf of the Party to the Contract.

PROCEEDINGS

• • • • • • •

Mr. Kupsinel: For the purposes of admission into evidence, I believe Mr. Borenkind has already stated to me that he would not object to the receipt of a letter from the Law Department of Gulf Oil Corporation, 17 Battery Place, New York, New York, which is signed by Arthur L. Vangeli, and I move that these be marked for identification and be offered in evidence.

• • • • • • •

Trial Examiner: In the absence of objection, General Counsel's Exhibit 3 for identification, which is a letter from Gulf Oil Corporation, is received in evidence.

• • • • • • •

Mr. Kupsinel: Yes.

I shall now ask Mr. Borenkind and Mr. Eltman to stipulate that Abraham Peckman is the president of Reliance Fuel Oil Corporation, and Harold Packman is the secretary-treasurer.

Mr. Borenkind: I will so concede, Mr. Asher.

Trial Examiner: Is that at all material times?

Mr. Borenkind: At all material times.

Trial Examiner: Is it so stipulated?

[fol. 58] Mr. Eltman: I can't stipulate it, but if Mr. Borenkind tells me it is a fact, I won't challenge it.

Mr. Borenkind: It is a fact.

• • • • • • •

Richard Granger, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

• • • • • • •

Direct Examination.

By Mr. Kupsinel:

Q. Where are you employed at the present time, Mr. Granger?

A. Reliance Fuel.

Q. What type of work do you do for Reliance Fuel?

A. Oil burner service.

Q. How long have you held this position?

A. About one year now.

Q. Do you recall that an election was conducted by the National Labor Relations Board?

A. Yes, sir.

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By Mr. Kupsinel:

Q. Do you recall, Mr. Granger, that some time before the election was actually held that there was a hearing at the Board offices?

A. Yes, sir.

Q. Do you recall about when that was?

• • • • • • •

A. If it was 1959, it would have to be November, December. I don't know the exact date of the hearing we had prior to it.

Q. That is quite all right. I just want you to approximate it.

[fol. 59] Do you recall that prior to this hearing you had arranged for a meeting with representatives of Local Union 553?

A. That meeting was arranged at the request of some of the oil drivers.

• • • • • • •

By Mr. Kupsinel:

Q. Do you have a specific idea as to the time of this, as to tying it with some other act at this time or some other hearing or meeting, or anything else?

A. I would say this meeting was asked to take place around in October, but it was before the hearing we had, the first trial we had in New York. This meeting that was arranged for the benefit of the oil drivers had taken place around October.

• • • • • • •

By. Mr. Kupsinel:

Q. That meeting took place some time between the petition for the election and this hearing that was held at the Board?

A. That's right, sir.

Q. And that is as accurately as you can fix it from your memory?

A. Yes, sir.

Q. Now, would you state in your words what transpired that evening?

A. Well, at the meeting place there was myself, Ted Sammis——

Q. Excuse me for interrupting. Where was this meeting place?

A. This meeting took place at the Saddle Rock Diner in Massapequa.

Q. About what time? Do you recall that?

A. 6:30 p. m. And present at that time was myself, Ted Sammis, Mr. Sammis' serviceman, Mr. Maguire from Local 553, and Mr. O'Donnell from Local 553.

At the appointed time the meeting was to take place, none of the oil drivers had come down to the meeting, [fol. 60] so I was asked to go back and find out just what was holding up the drivers to attend the meeting.

Q. Excuse me for interrupting. About how long did you wait for them?

A. We waited a good half-hour to forty-five minutes.

So I rode back to the shop to find out where the drivers were, and they were all sitting in the office. Mr. Packman was present. I asked Mr. Packman how come these fellows weren't attending the meeting that they had wanted. They requested this meeting.

And Mr. Packman said, "To tell you the truth, I told them not to attend the meeting."

Q. Do you recall, Mr. Granger, were those his exact words, or were they words similar in meaning to that?

A. No, they were the exact words. I remember them.

Q. You mentioned there were employees seated with Mr. Packman—Mr. Packman, is that correct?

A. Mr. Packman.

Q. How many employees were there, approximately?

A. The fuel oil drivers. I guess they numbered between eight and nine drivers.

* * * * * * *

By Mr. Kupsinel:

Q. Do you recall that there was a change in working conditions among the drivers?

A. Yes, among the drivers.

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Q. Would you relate what it was called, and to your knowledge what is consisted of?

A. To my knowledge, it was called a shape-up, which affected the fuel oil drivers.

Q. Were the servicemen affected by this so-called shape-up?

A. No, sir.

Q. Was anything ever said about putting servicemen on [fol. 61] this so-called shape-up?

A. Well, from time to time there were hints dropped.

Q. By whom?

A. By Mr. Packman.

Q. Mr. Harold Packman?

A. Mr. Harold Packman.

Q. You say from time to time. Can you give any closer fixing of the time of that?

A. All I can say is it happened periodically.

Q. About how many times in all, roughly?

A. I'd say a good dozen.

Q. What did he tell you?

A. Well, he didn't want to see the servicemen go 553. He said the drivers are on shape-up now. He said, "You fellows haven't been hurt yet," meaning the servicemen have not been affected yet; words to that effect, from time to time.

* * * * * * *

By Mr. Kupsinel:

Q. Maybe you could state, Mr. Granger——

A. These things were taking place from when we first wanted the union up to the time of the election.

Q. Were any statements like this made after the election?

A. After the election is when the shape-up for the fuel oil drivers started.

Q. After the election, would you approximately state how many times these statements were made?

A. Well, personally, once to me at the night of the signing of the contract with Local 355.

Q. To go back a moment to try to fix this date of these statements about the so-called shape-up, Mr. Granger, I

don't recall if I asked this: Do you recall when this shape-up went into effect? That might help us pin the date.
[fol. 62] A. It went into effect right after the election that was conducted by the Board.

Q. Do you recall when that was?

A. Well, the election was in January. The exact date, as far as numbers go, I don't remember.

Q. But the statement was made to you how long after the election? If you don't recall when it is, do you recall how many days after it was?

A. The statement was made to me February 15th.

Q. The statement was made to you February 15th?

A. Yes.

Trial Examiner: Of this year?
The Witness: Of 1960.

By Mr. Kupsinel:

Q. Would you relate in your own words what took place on February 15th? Describe who was present, and so forth.

A. I had come in; I was on the night shift at that time. I had come in to gas up my truck and I saw there was a meeting in progress, so I went into the rear of the shop where the meeting was and all the servicemen and fuel oil drivers were present and they had just finished negotiating terms to a Local 355 contract. And——

* * * * * * *

A. Yes. The negotiation had finished and they were in the process of signing the contract. I was asked if I would sign the contract. I said, "No, not at this"——

Q. Excuse me, Mr. Granger. I don't like to interrupt you.

When you say you were asked, who asked you, do you recall?

A. Well, Mr. Ackerman and Mr. Sammis approached me and asked if the contract should be signed. I said I wouldn't sign——

[fol. 63] Q. Excuse me.

For the record, Mr. Ackerman and Mr. Sammis are two fellow employees; is that correct?

A. Yes.

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I said I wouldn't care to sign it at this time because the Labor Board was in the process of making a ruling on the challenged votes we had from the election.

Mr. Sammis and Mr. Ackerman both thought the same way, and we thought it would be right if we went in and told Mr. Packman our intentions. We approached Mr. Packman and said we didn't want to sign a contract at this time because we doubted the legality of a contract at that time, being the Board was in the process of determining the challenged votes. We said we would prefer to wait until the outcome of it.

To which Mr. Packman replied—before that statement, we asked what he though if we didn't sign the contract, and he replied if we didn't sign the contract "We'll tell them you fellows don't want to work here," at which time then we signed the contract, and Mr. Ackerman, Mr. Sammis and myself, we signed the contract.

Q. Did Mr. Packman make any statements to you about the possible outcome of the election that was pending before the Board?

A. He made it to a group, not me personally. It was made to a group.

Q. What did he say?

A. He said——

* * * * * * *

By Mr. Kupsinel:

Q. Would you tell us what that statement was?

A. That Local 553 wasn't going to win the election.

Q. Were those his exact words or approximate words?

A. They were exact words.

* * * * * * *

[fol. 64] Cross examination.

By Mr. Borenkind:

Q. Mr. Granger, I wish you would recall the first meeting that you testified to where you called to see Mr. Packman and asked him the reason that the fuel oil drivers did not attend a certain meeting. Do you recall that testimony?

A. Yes, sir.

Q. Could you tell me the approximate date when you made that request of Mr. Packman?

A. I didn't—I went back into the shop personally and confronted the men. I mean, it was not done over the telephone.

Q. I realize that, but I am trying to pin it down to a date.

A. The exact date I won't remember.

Q. Would you say it was in September of 1959?

A. No; I believe it was in October.

Q. Was that the first request you made that the fuel oil drivers attend that meeting?

A. You have a misunderstanding. It is not a request that I made. One of the drivers had come to me as more or less the spokesman for the fuel oil drivers at that time and expressed the wish on his part that he would like to meet with Mr. Maguire from Local 553 to see their contract at that time, and that is why the meeting come about. It was not my idea of a meeting. I was asked by one of the drivers to set the meeting up.

Q. Do you recall the date?

A. The date, the exact date, I don't remember. I never marked the date down for sure.

Q. In any event, it was prior to a hearing held at the Board?

A. That was prior to the hearing held at the Board.

You are speaking about the first hearing?

Q. The first hearing.

A. It was prior to that.

[fol. 65] Q. Do you know, Mr. Granger, of your own knowledge, that Local 553 had initially petitioned for representation of only the service employees and not the fuel oil drivers?

A. Yes, the servicemen petitioned first.

Q. Alone?

A. Alone.

Q. At which time the drivers were not included?

A. At the time the petition was made.

* * * * * * *

Mr. Kupsinel: Before we move to the next witness, Mr. Trial Examiner, I believe I should get a stipulation now

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as to the fact that Murry Flatow is the president of Amalgamated Local Union No. 355.

Mr. Eltman: Local 355 will so stipulate and make a representation to the other parties that that is a fact.

Mr. Borenkind: I will not object to it.

Mr. Levy: Neither will I.

Trial Examiner: And he was president of 335 at all material times?

Mr. Eltman: That is correct.

* * * * * * *

[fol. 66] CHARLES THEODORE SAMMIS, JR., called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

Direct Examination.

By Mr. Kupsinel:

Trial Examiner: Where are you employed?

The Witness: I am employed at Reliance Fuel Oil Corporation.

By Mr. Kupsinel:

Q. What type of work do you do there?

A. Fuel oil service.

Q. How long have you been employed in the fuel oil service?

A. Approximately a year and four months at Reliance.

Q. You are aware that an election was held amongst the employees?

A. Yes.

Q. Do you recall when that election was?

A. I am very poor on dates. You are referring to the first one, I imagine, the one held at the Board?

Q. I am referring to the Board election.

A. I think it was in January, but the date, exactly, I can't recall.

Q. Was there any change in working conditions among the drivers, to your knowledge, after the election?

A. Yes, there was. There was a shape-up.

Q. And do you know what this shape-up was?

A. Well, to my knowledge, it consisted of some of the men not working a few days, you know, during the week. And that's about it.

Q. And that applied to the drivers?

A. That is true.

[fol. 67] Q. Were the servicemen affected?

A. No, not at that time.

Q. Did Mr. Packman ever say anything to you about a shape-up for servicemen?

A. Once, in the presence of others, he did mention that in so many words. I don't remember the exact wording——

* * * * * * *

By Mr. Kupsinel:

Q. Yes. Do you recall a date?

A. It was during the time of this shape-up period. The exact day, I can't recall the date.

Q. Let's try to fix it slightly closer.

It was after the election, you said?

A. After the election.

Q. Do you recall how many days after the election?

A. Approximately a week.

Trial Examiner: I think that fixes a time. Go ahead.

By Mr. Kupsinel:

Q. What did he say, Mr. Packman to you—in the presence of others, you stated?

A. Yes.

Q. Do you recall who the others were, before we get into what he said?

* * * * * * *

By Mr. Kupsinel:

Q. In others words, were there several men; were they servicemen and drivers, or whatever you recall about who was there.

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A. Well, I recall there were some servicemen there, and possibly some drivers; I am not sure.

Q. Now that we have that, what did he say?

A. Well, he stated that, "You see what's happened to the drivers, and you men haven't been hurt as yet," • • • [fol. 68] Q. And did he say anything about a shape-up on any other occasion to you?

A. Yes. On several occasions before the election and after it I heard him say, in the presence of others, that there will be a shape-up if we have 553 Union.

Q. On several occasions?

A. Yes.

Q. You have no better knowledge of when this took place?

A. I would say numerous occasions, and it would be difficult to pin it down to one date.

Q. When you say "numerous," about how many different occasions?

A. At least a dozen.

Q. And this is all prior to the election?

A. Prior and after the election.

Q. Do you recall, Mr. Sammis, ever attending a meeting when there were representatives of Local 355 present at the premises of Reliance Fuel Oil Corporation?

A. The only time I attended anything—I don't know if you would classify it as a meeting—was when they were going over this contract, and I suppose that would be a meeting.

Q. Do you recall when that was?

A. Let's see. It was after the election held by the Board. Gosh, I guess that was about three weeks, something like that, possibly.

Q. Approximately three weeks after the election?

A. I imagine so, yes.

Q. I wish you would tell us, in your own words, what took place. About what time of the day it was, who was there, and what was said and done.

A. Well, to start with, I wasn't notified of this meeting. I came in late; I imagine it was about fifteen minutes late. I believe it was about 6:30. And Mr. Flatow, Mr. Packman, Mr. Peckman were seated there, and the oil drivers [fol. 69] —I think they were all there. The servicemen

were there with the exception of a man named Rio Massena and Richard Granger.

Mr. Flatow had what I believe to be a copy of the contract in his hand, and Mr. Peckman, I believe, had a similar copy in his hand, and Mr. Flatow was reading out loud the different statements on the contract.

* * * * * * *

By Mr. Kupsinel:

Q. Excuse me for interrupting, Mr. Sammis, but aside from the contents of this agreement that was being proposed—that is actually not material at this hearing—what I want to get at is the further information of what was said and so forth, aside from the contents of the collective bargaining agreement being discussed.

A. Well, at the end of this meeting we were asked to sign this contract and——

Q. Now, when you say you were asked to sign, Mr. Sammis, do you recall who asked you to sign?

A. Who?

Q. Yes.

A. Let me see. I believe it was Mr. Flatow. * * *

The Witness: Well, after the meeting I approached Mr. Ackerman and I told him that I didn't——

* * * * * * *

By Mr. Kupsinel:

Q. Just state what you said to people, instead of what you thought.

A. All right. I didn't want to sign at the time, so just a little before that Dick Granger came in, Richard Granger, one of the servicemen, and——

Mr. Eltman: A little before what?

A. —and Mr. Ackerman, and I told him what happened, and we were asked to sign this contract and we decided that [fol. 70] we would not sign it then, that we would rather wait for the ruling from the Board. So we felt that the best thing would be——

Mr. Borenkind: I object to what he felt.

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Trial Examiner: Let's skip over what you felt. I will grant the motion to strike.

By Mr. Kupsinel:

Q. Did you relate the fact that you did not want to sign this to anyone?

A. Yes.

Q. To whom did you relate this?

A. I related it—rather, Dick Granger related it, in the presence of myself and Carl Ackerman, that we did not want to sign the contract at this time because we didn't feel it was legal.

• • • • • • •

By Mr. Kupsinel:

Q. Did you you state this in words to Mr. Flatow, Mr. Peckman or Mr. Packmen?

A. To Mr. Packman, we stated so in words.

Q. What were the words stated to Mr. Packman?

A. That we did not wish to sign the contract at this time until we hear the decision from the Labor Board.

Q. Was it stated by Mr. Granger or by you?

A. I believe it was stated by Mr. Granger.

Q. Did Mr. Packman respond to this statement in your hearing?

A. Yes, he did.

Q. What did he say?

A. He said, "What's the matter? Don't you want to work here any more?"

And I said, "It isn't that. It is just that we don't feel we should sign at this time."

Q. Did Mr. Flatow make any comments in response to this?

A. Yes. He said, "I wouldn't be here if this wasn't legal."

Q. And did Mr. Abraham Peckman make any response?

A. Yes, he did. He said at the time that, "I would take [fol. 71] full responsibility for anything that took place here." So we signed it.

• • • • • • •

Trial Examiner: Now, Mr. Sammis, at the end of the meeting you have described, you said you and Granger and one other—who was the other?

The Witness: Carl Ackerman.

Trial Examiner: —approached Mr. Packman?

The Witness: Packman, correct.

Trial Examiner: The three of you walked over together, I gather.

The Witness: That's right.

Trial Examiner: Granger did the speaking?

The Witness: Yes.

Trial Examiner: When Granger spoke, did he say, "I am speaking for these other two fellows, also?"

The Witness: Well, he said, "we."

Trial Examiner: Did he indicate you with any gesture as to whom he meant by "we?"

The Witness: Well, there were just the three of us who approached Mr. Packman, and he said "we."

* * * * * * *

[fol. 72] CARL ACKERMAN, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

Direct Examination.

By Mr. Kupsinel:

Q. Mr. Ackerman, where are you employed at the present time?

A. I am employed at the Reliance Fuel Oil Corporation, 500 Hicksville Road, Massapequa, Long Island.

Q. What type of work do you do?

A. Serviceman.

Q. How long have you been so employed?

A. Over three years.

Q. Do you recall that there was an election held by the National Labor Relations Board for the employees during this year?

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A. Yes.
Q. Do you recall when that election was held?
A. The exact date, not offhand.
Q. Approximately what date?

• • • • • • •

A. Well, that was this year, January.
Q. Are you aware that working conditions were changed of the drivers?
A. Yes.
Q. When did that take place?
A. I would say it was right after the election.
Q. Right after the election?
A. Yes.
Q. Would you describe to your knowledge what that change was?

Mr. Borenkind: May we fix a date, sir?
The Witness: A date I can't fix, but I would say it was right after the election, approximately, I would say, a week or so.

[fol. 73] By Mr. Kupsinel:

Q. A week or so after the election?
A. Right.
Q. Would you state what those changes were for the drivers?
A. Well, I would say that a few of the drivers had to shape up.
Q. And what do you mean by "shape up"?
A. Well, they were told that there was no work for them these particular days, and that was that.
Q. And you said previously that you had been employed by Reliance for over three years. Had this type of shape, so called shape-up, ever been in effect before?
A. Not to my knowledge.

Trial Examiner: For whom? For any employees?
Mr. Kupsinel: For any employees.
The Witness: Not to my knowledge. I never heard of it.

By Mr. Kupsinel:

Q. Do you recall ever attending a meeting on the premises of Reliance where there were representatives of Local Union 355?

A. Yes, sir.

Q. Do you recall when that meeting took place?

A. February 15th.

Q. Would you tell us who was there at that meeting?

A. Mr. Abraham Peckman, Harold Packman, Mr. Flatow, and the majority, I would say the majority of the employees were there.

Q. Now, in your own words, would you tell us what took place at that meeting? What time did you arrive there, first of all, and who was there when you arrived?

A. I would say I arrived around 6 or 6:15, somewheres in that vicinity, and there was a process of negotiating the contract. Mr. Flatow had the contract in his hand and he [fol. 74] was reading it off, and some of the men were discussing the contract and actually negotiation was going on at the time.

Q. Aside from the contents and the discussion of the contents of this contract, did you speak to anyone concerning it?

A. No, because—

Q. Did any questions cross your mind concerning this contract, other than the contents of it?

A. Only whether it was a legal set-up.

Q. Did you speak to anyone about that?

A. Yes.

Q. To whom did you speak?

A. First, I approached Mr. Flatow there and asked him if he thought it was a legal thing for us to go ahead and negotiate such a contract, and his exact words were that he wouldn't be there if it had not a legal set-up.

Mr. Kupsinel: Excuse me.

Are you able to hear this well, Mr. Trial Examiner?

Trial Examiner: Yes, I can hear this.

Mr. Kupsinel: All right, sir.

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By Mr. Kupsinel:

Q. Did you ask anyone else on this same question of whether it should be done at this time?

A. Well, I would say the negotiations at that time was just about arrived at, and it was a matter of signing the contract. So the three of us, Mr. Granger and Sammis and myself, questioned the legality of the set-up before we would sign it.

Q. Whom did you question?

A. Well, I approached Mr. Abe Peckman first and asked him. I said, "Mr. Peckman, do you think it is okay if we sign this contract?"

He said yes, he thinks it would be okay, or else he wouldn't have been there; that he would take full responsibility.

[fol. 75] Q. Did you speak to anyone else besides Mr. Flatow and Mr. Abraham Peckman?

A. No, I think that is all I spoke to, just those two gentlemen.

Q. Did Mr. Harold Packman made any statements at this time?

A. Well, offhand, I can't recall any particular statements that he made right now.

* * * * * * *

Re-direct examination.

By Mr. Kupsinel:

Q. I would like this marked for identification purposes as General Counsel's Exhibit 4.

* * * * * * *

By Mr. Kupsinel:

Q. I ask you now, Mr. Ackerman, to look at this document I have and tell me if this is the contract or if this is what you have been talking about (handing document to witness).

A. Yes, that's it. Those are the changes that were made after the—during the process of negotiation.

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Trial Examiner: In the absence of objection, General Counsel's Exhibit 4 is received in evidence.

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[fol. 76] DONALD R. KERSHOW, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

• • • • • • •

Direct examination.

By Mr. Kupsinel:

Q. Mr. Kershow, would you state where you are employed at the present time?

A. I am presently employed with the Reliance Fuel Corporation.

Q. Reliance Fuel Oil Corporation?

A. Yes.

Q. What type of work do you do?

A. I am a fuel truck driver.

Q. How long have you been employed?

A. It will be one year May 2nd of this year.

Q. Do you recall that an election was conducted by the National Labor Relations Board?

A. I do.

Q. Do you recall when that was?

A. It was in January.

Trial Examiner: Of what year, Mr Kershow?

The Witness: 1960.

By Mr. Kupsinel:

Q. Before this election was held, were you paid a bonus based on the number of gallons that you delivered as a truck driver for Reliance?

A. Yes.

Q. And after the election did you receive the same bonus?

A. No, sir.

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A. I believe it was cut off as soon as the election was over.

Q. In other words, right after the election this bonus arrangement was stopped; right after the election?

A. Yes, sir.

[fol. 77] Q. Was it ever resumed?

A. I believe we were paid after the negotiations with the other union. I think we were paid retroactive for so many days, but I don't know how much.

Q. That was after the agreement that has been talked about here was signed with Local 355?

A. Yes.

• • • • • • •

Q. Now, I want to ask you again: Did Mr. Packman ever say anything to you at the time when this bonus arrangement was stopped? Do you recall now?

A. I was pulled into the office on the basis of that, and it would be a different arrangement would be made if we——

• • • • • • •

Q. Who called you into the office, first of all?

A. Mr. Packman did.

Q. Mr. Packman did, Mr. Harold Packman?

A Yes.

Q. What did he say to you?

• • • • • • •

A. He explained it to me that it was, the situation as it was, and the shape-up. I definitely couldn't understand it, and he said——

Q. First of all, before we go on that point, did he say why the shape-up?

A. Why the shape-up?

Q. Yes.

A. Because, I believe, he was giving us a taste of——

Q. Speak up so that the Trial Examiner can hear you.

A. He was giving us a taste of what the 553 would be if they did come in, I believe.

• • • • • • •

Q. Approximately what did he say?

[fol. 78] A. The reason for the conditions would be that he was giving us a taste of what the 553 would be if they did come into the corporation.

Q. Did Mr. Packman state at this time whether or not the bonus arrangement would be restored?

A. I think he did mention something to that effect, that it would be restored, yes, sir.

Q. And what did he tell you that you might do, if anything?

A. Well, he said that if I could get a few other drivers in my capacity to see if we could straighten this out in our you know, well——

Q. What did he want you to do? What did he say he wanted you to do? "Straighten out" doesn't mean much to anyone.

* * * * * * *

The Witness: If I can get a couple of other drivers to go with me to change the majority of the men going in to 355, I believe that is——

By Mr. Kupsinel:

Q. Do you recall any more detail of what was told to you?

A. He mentioned two names. He mentioned Joe and Ben Mendolia to me.

Q. Did he mention about what particular action he wanted you to take to stop this 553 from coming in, I believe you said just now?

A. I believe an affidavit. Not an affidavit; a petition. I believe that would be the legal procedure.

Q. This is what Mr. Packman told you?

A. Yes.

Q. What did he tell you? Now that you've got it back, see if you can rephrase it to state what he told you.

A. If the petition would be signed and it would be pushed through different channels, you know, and I don't know if he said it would be, maybe a re-vote.

[fol. 79] Q. If you recall, before I started on this conversation, the question was how conditions might be re-

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stored. And did Mr. Packman state anything about restoring the conditions?

A. Yes.

Q. That was what you were saying just now?

A. Yes.

* * * * * * *

Cross-examination.

By Mr. Borenkind:

Q. Mr. Kershow, you testified that prior to the election there was a bonus arrangement between Reliance and its drivers?

A. Before?

Q. Before the election.

A. Yes.

Q. Now, will you tell us the nature of this bonus arrangement?

A. The nature was that each driver would put out five thousand, that is, net per day.

Q. Five thousand what?

A. Gallons.

Q. Of fuel oil?

A. No. 2 fuel oil. After the five thousand gallons were put out, the man would receive a half-a-cent anything over that five thousand gallons.

Q. Were you also paid for working in excess of forty hours per week?

A. Over forty hours a week, sir?

Q. Yes.

A. We are paid for any day we work on that basis.

Q. And if you didn't work? Were you paid for days you didn't work?

A. I believe last summer I was off every other Saturday, and I got paid for that Saturday I didn't work.

Q. And you were on a forty or forty-eight-hour week?

A. I was on a six-day week. There was no hour basis on it.

Q. No hour basis?

A. No, sir.

Q. Now, you did testify, did you not, that subsequent to the election there was a shape-up program adopted by Reliance?

A. Right, sir.

[fol. 80] Q. Were you affected by the shape-up program?

A. Right, sir.

Q. Did you lose any time from work as a result of it?

A. Definitely, sir.

Q. How many days did you lose during that period?

A. I believe it was the Tuesday prior—after the election; that was the first day I did lose time. I think it was Tuesday, Thursday, and I think it was around three or four days, I believe; four days.

Q. Were any of the other drivers affected by this shape-up program?

A. Yes, sir.

Q. Was there any driver that worked a full week during this shape-up program?

A. I believe so.

* * * * * * *

Re-direct examination.

By Mr. Kupsinel:

Q. There was some cross examination about overtime pay.

Now, would you state what the terms of pay were before the election?

A. I was paid on the basis of a six-day week. I believe I was making $105.

Q. Was there anything to the amount of hours in the six-day week?

A. It was $105 for six days.

Q. Regardless of how many hours you worked?

A. Right.

Q. There was no overtime payment, then, unless you worked on a Sunday; is that right?

A. Overtime was on a gallon basis.

Q. Were you ever called in to work on a Sunday?

A. Yes, sir; the second day I was working for the company I was.

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Q. Were you paid for such Sunday service?

[fol. 81] A. I was paid on the basis that every gallon I delivered I was paid a half-cent.

Q. That was the bonus arrangement?

A. I remember the day I worked I delivered fifty thousand gallons and I paid twenty-five dollars.

* * * * * * *

By Mr. Levy: * * *

Q. In connection further with the shape-up system and the bonus for gallons, is it not correct that both the shape-up and the bonus-for-gallons changes took place for the first time when the election was held?

A. The first time after the election.

Q. Shall I rephrase that? Did you understand my question?

A. It was after the election was held.

Q. In other words, up till the time of the election, you did receive a bonus for gallons and you did not have a shape-up?

A. That's right.

Q. After the election you did have a shape-up and you received no bonus for gallons?

A. Right.

Q. Is it not correct that both of those conditions continued until the time you signed a contract for 355, and then they changed back again right after you signed a contract for 355?

A. Those conditions did not change back, because those conditions didn't prevail at that time.

Q. In other words, the shape-up was discontinued when you signed the contract for 355?

A. Yes.

* * * * * * *

[fol. 82] Re-cross examination.

By Mr. Eltman: * * *

Q. Was there anything said about the shape-up by employees to anyone else at any other time?

A. It is possible it could have been, because definitely I don't think any man could have lived under those conditions, so I guess they did.

Q. Didn't you say a little while ago the men had complained about the shape-up?

A. Definitely. I complained myself.

Q. To whom did you complain?

A. To myself, to my wife, and everyone else.

Q. Did you complain to anyone at the place of business?

A. To the other men, yes.

Q. You did complain to the other men?

A. Sure.

Q. Did other men complain to you?

A. I think they reversed the problem back to me, yes.

* * * * * * *

Q. Were you told after the meeting that there would be no more shape-up?

A. At the negotiation of the contract?

Q. Yes.

A. I believe—I think the company and the men, and everybody else involved, would abide by the contract, so naturally if they abide by the contract there wouldn't be no shape-up.

Q. That is correct. And this was your understanding of what the contract provided; is that right?

Mr. Eltman: I have no further questions.

* * * * * * *

[fol. 83] By Mr. Borenkind:

Q. Mr. Witness, I show you this paper and ask you whether or not your signature appears on it.

(Witness examines document.)

A. Yes, sir.

Q. Is that your signature which is the third from the bottom in the right column?

A. It's the fourteenth one in line, yes.

Mr. Borenkind: I offer it in evidence.

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Trial Examiner: Any objection to the receipt in evidence of Respondent's Exhibit 1?

Mr. Kupsinel: I haven't seen it yet.

* * * * * * *

Mr. Kupsinel: You stated that this is your signature here (indicating)?

The Witness: The fourteenth, right here (indicating).

Mr. Kupsinel: Would you tell us the circumstances of how you signed this document?

Mr. Borenkind: I don't believe that is relevant.

Mr. Eltman: I believe it is beyond the *voir dire,* beyond the scope of *voir dire.*

Mr. Borenkind: The witness has testified he signed the document. It is within the issues.

Trial Examiner: The instrument isn't in evidence. If his answer was that someone held a gun to his head, I would have to exclude the document, so I want the circumstances.

Go ahead and answer as to the document.

The Witness: I signed it under my own free will.

Mr. Kupsinel: I didn't quite hear you.

[fol. 84] The Witness: I signed it under my own free will.

Mr. Kupsinel: This is the same document that you answered my questions on before, that Mr. Packman told you that if you got Ben and Joe Mendolia to go with you on this petition and stop 553 from coming in, that the conditions would be restored; is that true?

The Witness: Restored, changed, whatever; yes.

Mr. Kupsinel: Did that have any bearing on your signing this document?

* * * * * * *

The Witness: I think the conditions of the workmen at that time made me more or less sign it.

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Mr. Kupsinel: I have no objection to the receipt of this document in evidence.

Trial Examiner: Are there any objections by any other parties?

(No response.)

Trial Examiner: It will be received in evidence as Respondent's Exhibit 1.

* * * * * * *

By Mr. Kupsinel:

Q. I would like to get a little more detail on how this was signed, Mr. Kershow.

Who gave it to you to sign? How was it circulated? What do you know about this petition? State in your own words the story of how this happened.

A. Nobody actually gave it to me. I believe it was on a desk in back of the shop, left there, and I signed it.

* * * * * * *

[fol. 85] Q. You stated, when I was discussing how this was signed before it was received in evidence, that it was a factor in your signing it, the fact that you were on shape-up at the time; is that right?

A. Yes.

* * * * * * *

By Mr. Levy:

Q. Isn't it true that the only reason you signed this document was because you wanted to get off shape-up and you wanted your bonus for gallons back, and for no other reason? Isn't that true?

A. I believed that the conditions could have been corrected, yes.

* * * * * * *

Trial Examiner: All right.

Mr. Kershow, when was the last date on which, to your knowledge, there was any shape-up of drivers?

The Witness: The last date?

Trial Examiner: Yes.

The Witness: I think it was when the contract was signed, I believe.

Trial Examiner: There hasn't been any further shape-up since then?

The Witness: No, sir.

* * * * * * *

COPY BOUND CLOSE IN CENTER

[fol. 86] BENJAMIN MENDOLIA, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

Direct examination.

By Mr. Kupsinel: * * *

Q. Would you state where you are employed at the present time?

A. Reliance Fuel Oil Corporation.

Q. What type of work do you do?

A. Fuel oil driver.

Q. How long have you been so employed?

A. About seventeen months now.

Q. About seventeen months?

A. Right.

Q. Do you recall that an election was held by the National Labor Relations Board among the employees of Reliance?

A. Yes.

Q. Do you recall when that was?

A. I believe it was in January, 1960.

Q. Did you work full time before the election?

A. Yes.

Q. And did you work full time after the election?

A. No.

Q. Would you explain in your own words why that was and how it came about to your knowledge?

A. Well, to my knowledge, how it came about was that there wasn't that much work to be done, and he said that this was a shape-up right now.

Q. I would like to get for the record an indication of what this so-called shape-up is. In other words, who told you what, and what happened?

A. Mr. Harold Packman said we would come in, and if there was work we would work; if not, then there wouldn't be no work to be done.

[fol. 87] Q. Were you paid overtime payments before the election?

A. Yes, sir.

Q. Were you paid over-time payments after the election, at the time of this shape-up?

A. No, sir.

• • • • • • •

By Mr. Kupsinel:

Q. I don't recall if you stated, Mr. Mendolia, when this shape-up occurred.

A. It occurred after we had the vote for which union was going to come in, the Labor Board vote.

Q. And about how long after the election was this?

A. It was about a week, two weeks; somewheres around that time. I couldn't really tell you.

• • • • • • •

By Mr. Kupsinel:

Q. Who presented this petition to you to be signed?

A. It wasn't presented to me. It was—I come into the back room of the shop and I saw a lot—most everybody signing it. So I went over and I picked it up and I looked at it, so I agreed upon it, so I put my signature on it.

Q. Did anyone tell you the reason why this petition was there?

A. They told me the reason why the petition was there was that there wouldn't be any more shape-up.

Q. And who told you that?

A. Mr. Murray Flatow said that with this union there is no shape-up, we are always guaranteed work; that if 533 came in we are not always guaranteed work, because that is the way they work.

Q. In other words, you signed this petition so that you would be back to a full-time job? That is the reason you signed it; is that correct?

A. That's right.

• • • • • • •

[fol. 88] Q. Since you first worked for them, did you work a full year round?

A. Sure.

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Q. You did?
A. All year round.
Q. Including summers?
A. That's right.
Q. There are some men, I believe, that are called seasonable men?
A. That's right.
Q. That wasn't you; is that correct?
A. No.
Q. Now, these seasonal men were called back just before the winter began; is that right? They were laid off after the winter was over, and called back when the winter began; is that right?
A. That's right.

* * * * * * *

By Mr. Levy:

* * * * * * *

Q. How many years have you been working in the oil business as a driver?
A. I worked in the oil business five years.
Q. Five years?
A. Yes.
Q. Normally, what is the busy season in the oil business? Can you tell me what?
A. Normally, I would say from October to maybe April; mostly March, we will say, not too much April.

* * * * * * *

By Mr. Levy:

Q. Would you say that January, February and March are busy months in the oil business?
A. Yes, they are.

* * * * * * *

By Mr. Levy:

Q. Did Mr. Harold Packman ever tell you that you would lose your job unless you voted for Local 355?
A. I don't think he ever told me that I would lose my job.

Q. Did Mr. Packman ever tell you anything in respect [fol. 89] to voting for Local 355?

A. Mr. Packman told me that if 355—553—that is what you are asking, 553, right?

Q. Yes.

A. —ever got in, that that is the way they operate, on a shape-up.

• • • • • • •

Trial Examiner: Just what period of time are you covering?

Mr. Levy: Let's cover the time since the election.

Trial Examiner: In view of that limitation, I will overrule the objection.

A. Like I said before, Mr. Packman says that if 553 did get in, that we would all be on the shape-up, because that is the way they operate.

Q. At that time, if it was after the election, you were all on shape-up, anyway?

A. Yes; because it was pretty warm out.

• • • • • • •

By Mr. Levy:

Q. Did you say anything to Mr. Harold Packman after the shape-up was put in?

A. Yes.

Q. What did you say to him?

A. I said, "How come the shape-up?"

Q. What did he say to you?

A. He said, "One, first of all, it's warm out; and second of all, that's the way 553 operates."

• • • • • • •

Q. Did you agree with the shape-up while it was in effect?

A. I don't agree with the shape-up. I got a wife and family, too. I don't think anybody does.

• • • • • • •

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[fol. 90] Cross-examination.

By Mr. Borenkind: • • •

Q. Mr. Mendolia, in the normal season, heating season, how long would it generally require a driver to deliver five thousand gallons of fuel oil?

• • • • • • •

A. It's according to what section he covers. In my section, what I cover——

Q. I say under normal circumstances. I appreciate your circumstances might be abnormal.

A. Well, we will just say in Massapequa, that is a closed section, we will say around sixty-six hundred by five o'clock, from eight to five; that is, taking a lunch hour and a coffee break.

• • • • • • •

Q. Therefore, deliveries of products in excess of five thousand gallons prior to the election, drivers would be entitled to a bonus; was that the understanding?

A. That's right.

• • • • • • •

Vincent Graziano, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

• • • • • • •

Direct Examination.

By Mr. Kupsinel:

Q. Where are you employed at the present time?

A. Good Humor Corporation, Gar Avenue, Lindenhurst.

[fol. 91] Q. Were you ever employed by Reliance Fuel Oil Corporation?

A. Yes, sir.

Q. When were you employed by them?

A. I don't remember the exact date, but I started employment on, I think, the 8th of November.

Q. Of which year?

A. 1959.

Q. To when?

A. To April—no, excuse me; February *30*th, 1960.

Q. What type of work did you do?

A. Fuel oil driver.

Q. Do you recall that an election was conducted by the National Labor Relations Board while you were an employee there?

A. Yes, sir.

Q. Do you recall when that was?

A. That was in January.

Q. Did you work full time before this election?

A. Yes, sir.

Q. And did you work full time after this election?

A. No, sir.

Q. Did anyone ever tell you that you could get back the money for the days that you didn't work after this election? I am talking about the time while you were still an employee of Reliance Fuel Oil Corporation.

• • • • • • •

A. Yes.

Q. And who told you this?

A. Mr. Peckman said that we could get reimbursed.

Q. Is that Mr. Peckman or Mr. Packman?

A. Harold.

Q. Mr. Harold Packman?

A. Yes.

• • • • • • •

Q. Yes. If you recall now, there was a so-called shape-up system, and you were laid off?

A. Yes.

[fol. 92] Q. Do you recall speaking to Mr. Packman about it?

A. No, I didn't speak to Mr. Packman.

Q. But did he speak to you about it?

A. In a group form, to all of us.

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Q. In a group form?
A. Yes.
Q. What did he tell you, even though there was a group present?
A. He said that we—that with 355 we would get reimbursed for the days that we lost.

• • • • • • •

By Mr. Kupsinel:

Q. Now I will ask you again, Mr. Graziano, what positive action did Mr. Packman tell you to do if you wished to get paid for the days that you had been laid off?
A. Sign for 355.
Q. And that was on what date that he told you that?
A. I said February 3rd, according to my article there.

• • • • • • •

Cross-examination.

By Mr. Borenkind:

Q. Mr. Graziano, the conversation you had with Mr. Packman, Harold Packman, you said was held on February 3rd, 1960?
A. I didn't personally have that conversation with him, sir. I said in a group.
Q. When was that statement made by Harold Packman to the group; do you recall the date?
A. In the evening, after work; about five o'clock in the evening.
Q. Do you recall the date?
A. I did say February 3rd.
Q. Is that the date?
A. That is what I said it was on the paper, February 3rd.

• • • • • • •

[fol. 93] JOSEPH MENDOLIA, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

Direct Examination.

By Mr. Kupsinel: * * *

Q. Where are you employed at the present time?
A. Reliance Fuel Oil Corporation.
Q. How long have you been employed there?
A. Just about a year.
Q. What type of work do you do?
A. I am a fuel oil driver.
Q. Did you work all year round for Reliance? You said about a year?
A. Yes, I worked all year round, sir.
Q. Do you recall that there was an election held by the National Labor Relations Board among the employees at the Reliance Fuel Oil Corporation?
A. Yes, sir.
Q. Do you recall that prior to this election last fall that there was ever a meeting called where representatives of Local 553 were to talk to the employees?
A. Yes, sir.
Q. Do you ever recall attending that meeting?
A. Yes, sir.
Q. Did anyone ever tell you not to attend that meeting?
A. Well, I was not told in exact words not to attend it. I was told in a way that it would be better for me not to attend the meeting. Mr. Packman didn't say not to go, strict orders. He said, "It would be better for you if you don't go." But I did go.
Q. You did go afterwards?
A. Yes.
[fol. 94] Q. To your knowledge, how many men were told by Mr. Packman not to go?
A. Well, as far as I know, he told only me, because I came in early that day. And as far as I know, everybody else, they left, they went home, and I went over to the Shamrock. It was over at the Shamrock Bar, that's across the street from the place, and from there we went to the Saddle Rock.

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Q. When you say "we," who accompanied you, do you remember?

A. Do you want their names?

Q. If you can remember them; or how many employees.

A. I'd say it was about six.

Q. About six?

A. About six.

Q. Altogether?

A. Altogether.

Q. Does that include the servicemen?

A. Yes. There was three servicemen.

Q. Three servicemen?

A. Yes.

Q. And about three drivers?

A. Three oil drivers.

Q. Do you remember how many drivers did not attend this meeting?

A. Well, all the men weren't there. It was just—at that time there was only, I'd say, only three or four drivers didn't go.

Q. That is to the best of your knowledge?

A. Yes.

Q. There may have been more, but you didn't know personally?

A. There was no more oil drivers. It wasn't the season for everybody to be back.

Q. In other words, about three went and about three or four didn't go?

A. That's right.

Q. After this election—before I finish with this business about not attending the meeting, did Mr. Packman give any reasons besides that it would be best if these employees did not attend the meeting? Did he say anything why it would be best if they didn't attend?

[fol. 95] A. Well, we weren't getting top wages at the time. Now, if he had to pay top wages, it had to be cut in order for him to *keep* him stay in business. And if we went like—he didn't say it direct, that if we went to 553 we would have to get laid off. If we have to get top scale for a five-day week, time and-a-half, and everything, he cannot keep us on all year round. He would do his best to keep us as long as he can.

• • • • • • •

Q. Do you recall that the election was held?

A. What month?

Q. The actual election, where the Board agent came down and you voted?

A. Yes. It was January 19th, 1960.

Q. Now, was there any change in your working conditions after the election?

A. Yes. The election was on a Wednesday night. We worked Thursday, Friday, Saturday, and we came in Monday and we had off Tuesday; we worked Wednesday and we were off Thursday, on Friday and Saturday. The next week we worked Monday, off Tuesday, on Wednesday, off Thursday, on Friday, on Saturday.

Q. How did this come about? Did you call in every night to find if you should come in the next day, or were you told you were on a different schedule?

A. No. We were told that the night before, when we came in; like on a Monday night, the first day we were off on Tuesday. Monday night we came in and he told——

Q. When you say "he," who specifically?

A. Mr. Packman.

Q. All right.

A. He said there was no work for each one that he told individually we was off, so we won't come in in the morning and just hang around.

[fol. 96] Q. So you were always told the day before?

A. Yes, sir.

Q. Did anyone complain—I mean, did you complain about this new so-called shape-up system?

A. Yes, sir.

Q. Who did you complain to?

A. I complained to Mr. Packman, I complained to the drivers.

Q. Do you remember when you complained to Mr. Packman?

A. It was on a Wednesday.

Q. This is the week after the election?

A. Yes. Because we were off on a Tuesday.

Q. What did you say to him?

A. I told Mr. Packman, I said—I can't remember the exact words. I asked him, "How come that we are having shape-up now?"

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He said, "That's the way 553 works. If you have to get top scale, I would have to lay you'se off."

Q. Did he tell you at that time what you might do to change conditions; I mean, to get away from the shape-up?

A. He didn't tell me. I asked him how I could get away from it.

Q. All right.

A. And he says, "It has nothing to do with me." He says, "You can call up Mr. Flatow and see what he can do for you."

Q. And did you do that?

A. I called up Mr.—no, I didn't; yes, I called up Mr. Flatow, and Mr. Flatow said, "The best thing you can do is to have a petition made up."

So I agreed to it and I talked to some of the fellow workers, and they all agreed to it. They thought it was a good idea. Instead of coming in two days a week and having to shape up, if we had Local 355 in it would be better for us, in that sense of the word.

[fol. 97] Q. Do you recall when the shape-up was discontinued?

A. The shape-up was discontinued after the contract.

* * * * * * *

Re-direct examination.

By Mr. Kupsinel:

Mr. Mendolia, I think about the last question I asked you was about the discontinuance of this shape-up system. You said, I believe, in your answer that it was after the contract was signed. Do you know who that contract was signed with, what union?

A. Local 355.

Q. And do you know when this was?

A. February 15th, 1960.

* * * * * * *

By Mr. Levy:

Q. Mr. Mendolia, prior to the election, did you receive a bonus for over five thousand gallons delivered?

A. Yes, sir.

Q. In, say, the month prior to the election, had you had occasion to actually be paid such a bonus? Did you have the kind of a route where you would get a bonus?

A. Almost every day, sir.

Q. And after the election did you receive a bonus on five thousand gallons?

A. No, sir.

Q. Did you complain about the absence of bonus to anybody?

A. Well, I complained to the boys. We all had a meeting on that, about why we weren't getting it.

• • • • • • •

[fol. 98] HAROLD PACKMAN, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

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Direct examination:

By Mr. Kupsinel:

Q. I think it has already been stipulated, Mr. Packman, that you are treasurer and secretary of Reliance Fuel Oil Corporation?

A. That is correct.

Q. Would you state the total amount of gross sales during 1959?

A. Do you mean our fiscal year, the heating season year, or what?

Q. I was after the calendar year of 1959, but if you don't have it you can give me any twelve-month period. Just state what twelve-month period it is.

A. Well, we do go on a fiscal-year basis, and we had six and three-quarter million ending June, 1959.

Mr. Eltman: Six and three-quarter million what?

The Witness: Gallons of fuel oil delivered.

By Mr. Kupsinel:

Q. I would like it in terms of dollar sales.

A. Dollars, I wouldn't have the slightest idea.

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Q. Without question, you have sales of over five hundred-thousand dollars a year?

A. That is correct.

Trial Examiner: Twelve-month period ending when?

The Witness: June, 1959.

By Mr. Kupsinel:

Q. During the calendar year of 1959, did you purchase over five hundred-thousand dollars of fuel oil and related products?

A. I would estimate that would be correct.

• • • • • • •

[fol. 99] By Mr. Kupsinel:

Q. And during that same period was there over five hundred-thousand dollars purchased from Gulf Oil Corporation?

A. I would say that is correct.

Q. For the purpose of the record, Mr. Packman, would you give a brief summary of your business operations as to what you actually do, the type of business you are in, and whom you sell to, and so forth?

A. We are in the home oil sales of fuel oil for heating purposes, and also servicing of the same burners and boilers.

Q. Most of your purchases are made from the Gulf Oil Corporation; is that correct?

A. That is correct.

• • • • • • •

Q. Physically, how do you get this oil from Gulf?

A. We have our trucks going down to the terminal picking it up.

Q. That terminal is located where?

A. In Oceanside, Long Island.

• • • • • • •

Q. Mr. Packman, did you ever receive a letter from Local 553 requesting that you meet with 553 for the purpose of collective bargaining?

A. Yes, I have.

• • • • • • •

By Mr. Kupsinel:

Q. Mr. Packman, I show you this letter and ask you if this is the letter you received requesting that you meet with Local 553.

(Witness examines document.)

A. That is it.

Mr. Kupsinel: I move that it be marked for identification, and offer it as General Counsel's Exhibit No. 5.

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[fol. 100] Trial Examiner: In the absence of any objection, General Counsel's Exhibit No. 5 will be received into evidence.

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Mr. Kupsinel: I now offer in evidence, as General Counsel's Exhibit No. 6, a letter signed by S. H. Borenkind, and addressed to Cohen and Weiss, Esqs., *re* Local 553, International Brotherhood of Teamsters.

• • • • • • •

Trial Examiner: In the absence of objection, General Counsel's Exhibit 6 is received.

• • • • • • •

Mr. Kupsinel: Will it also be stipulated that this document is in reply to General Counsel's Exhibit 5?

Mr. Borenkind: I will so concede.

• • • • • • •

By Mr. Kupsinel:

Q. Mr. Packman, were you furnished with a subpoena to produce records of all monies deducted from employees which were paid over to 355 for various purposes?

A. Well, according to our contract, we had made payments.

• • • • • • •

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Q. With the help of those records, would you state—I have not seen these, but you might be able to state from those records how much monies were deducted from employees' salaries, first of all, for the purposes of union dues?

• • • • • • •

A. You have union dues from the——

[fol. 101] Q. You might state the periods of time according to your records, Mr. Packman?

A. My records show for the full month of April——

Mr. Borenkind: What year, Mr. Packman?

The Witness: 1960.

From February 23rd to April 5th—in other words, you have those periods: From February 25th to April 5th, and April 5th to date, April 26th.

Trial Examiner: What was that last?

By Mr. Kupsinel:

Q. That was from when?

A. February 23rd.

Oh, no, I am sorry. I want to retract that, because that is another form. February 23rd through April 5th, the dues were collected and paid for to the Local 355.

Q. How much did that total? Do you have it in total or would you have to add them up?

A. The total, yes, $140. There are a few in here that vary because of the fact that they are not being employed after a certain period.

• • • • • • •

Cross-examination.

By Mr. Borenkind:

Q. In describing the operation of the Reliance Fuel Oil Corporation, would you please tell the Hearing Officer at what particular points in Long Island your trucks pick up the fuel oil products at its inception?

A. We pick up products at Oceanside, at our own plant, and on an exchange basis with other plants on Long Island.

Q. When you are referring to Oceanside, are you referring to the plant of the Gulf Oil Corporation?

A. That is correct.

[fol. 102] Q. Will you describe for us at this time the actual manual operation in picking up these fuel oil products?

A. Well, I haven't been driving a truck lately, but the men go down to the plant, they are given a ticket, a loading ticket, which they put in the meter, and they so load their trucks from the tanks of Gulf Oil Corporation.

Q. Are these tanks stationary?

A. That is correct.

Q. And they are located on the property of the Gulf Oil Corporation?

A. Yes, sir.

• • • • • • •

HAROLD PACKMAN, resumed as a witness for the General Counsel and, having been previously duly sworn, was examined and testified further as follows:

Re-cross examination (Cont'd.).

By Mr. Eltman:

Q. Mr. Packman, when we had adjourned last night I had asked you to secure from your bookkeeper any documents in the possession of Reliance Fuel Oil Corporation authorizing you to deduct dues from the wages of your employees in the bargaining unit.

[fol. 103] Have you been able to procure such documents?

A. Yes. I have them right here, twenty-one of them.

• • • • • • •

Trial Examiner: On the record.

Mark the twenty-one cards as Party to the Contract Exhibit No. 1 for identification.

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Mr. Eltman: I now offer these cards in evidence.

* * * * * * *

Trial Examiner: * * *

I am going to admit them into evidence on the grounds I think the proof shows that the signatures are authentic, and there is no evidence indicating that the date they bear is not the correct date.

* * * * * * *

ABRAHAM PECKMAN, called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

Direct examination.

By Mr. Borenkind:

Q. Mr. Peckman, are you an officer of Reliance Fuel Oil Corporation?

A. Yes, sir.

Q. What office do you hold?

A. I hold the office of president of the organization.

Q. Do you recall on or about January 27th, 1960 the National Labor Relations Board conducted an election [fol. 104] among your service and fuel oil drivers at Reliance's premises?

A. That's right.

Q. Following such election, did Reliance adopt or put into effect a work policy among your servicemen and fuel oil drivers that was different than the work policy of Reliance prior to the election?

Just answer yes or no, Mr. Peckman.

A. No.

Q. What was the work policy adopted by Reliance following the election of the Board on January 27th, 1960?

A. If I may go into a slight discussion of this, we as a rule put on sufficient men for a season to take care of our business. In this particular case, we were short approximately twenty percent of our general business due to warm weather.

I had two alternatives with it. I struggled for the month of December and January, working at a loss. I had an alternative at that point to lay off about thirty percent or forty percent of my driver crew. If I would do that, of course, the danger, was the possibility of getting cold weather the following day or the following week and losing my experienced men. The other alternative was to share the work.

We shared the work according to seniority rule, which means that the oldest men worked, and then in the following rule the others were either not given work or given the work according to if we had the work or if we didn't have the work.

• • • • • • •

Q. And this share-the-work program took effect following the election on January 27th, 1960?

A. That's right, yes. And it held until the weather [fol. 105] turned cold, which was around the last week of February or the beginning of March.

• • • • • • •

Q. Did you at any time, Mr. Peckman, encourage your service employees and fuel oil drivers to join Local 355, a party to this proceeding?

A. Well, I think I at one time made a statement during these proceedings that I did not like the Teamsters Union for ethical reasons. That is on the record. The rest may follow. I may have preferences. I did not tell them what to do. My own preferences were mine.

• • • • • • •

Q. Was Respondent's Exhibit 1 received in the mail?

A. Yes.

Q. And was it received from Local 355?

A. Yes.

Q. Do you recall the approximate date that it was received?

A. It's hard for me to say, but it could have been the first week in February, or thereabouts. I cannot pin it down to a date.

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Q. When was the first time, Mr. Peckman, that you saw Respondent's Exhibit 1?

A. You are talking about this here?

Q. Yes.

A. When it came in in the mail.

Q. Did you assist——

A. Let me correct this. I have seen a paper that could have been this in the back of the room. I did not look at it, except maybe just passing by; I mean, just looking in the direction, seeing this paper, and occasionally seeing a man sign it.

* * * * * * *

By Mr. Borenkind:

Q. I show you this paper, Mr. Peckman, and ask you what it represents.

(Witness examines document.)

[fol. 106] A. This was received in my office.

Q. Will you tell us what it represents?

A. It represents a telegram by Local 355 telling us that they——

Q. Wait a minute; don't tell us what it says.

Do you recall the date when this telegram was received?

A. Just probably a day or two after this petition came.

Q. Would you say around the 10th of February, 1960?

A. Yes, in the beginning of February.

Mr. Borenkind: May I offer it.

* * * * * * *

Trial Examiner: * * *

In the absence of objection, Respondent's Exhibit 2 is received in evidence.

* * * * * * *

Q. When did you next have a conversation with Murray Flatow following the receipt of this telegram?

A. Well, if you can take my thoughts as I can recollect them, we received a call by Mr. Flatow.

Q. When you say "we," who received that?

A. The office. I was in there. I am not always in the office, but I was in there for that particular time. Telling us that they would like to have a session to negotiate for a contract at that particular day at six o'clock. I am not sure if it was the particular day or the day before, that conversation over the phone. And we told them in lieu of this petition that we received, and this telegram, that I saw no objection.

Q. When did you next see Murray Flatow?

A. I saw him at six o'clock that evening——

[fol. 107] Q. Six o'clock which evening, Mr. Peckman?

A. Either the same day of the telephone conversation or the following day, I'm not sure.

Q. Do you recall the date when you next saw Mr. Flatow?

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A. It might have been on the 14th, or the next day, the 15th.

Q. Of February, 1960?

A. Yes.

Q. What did you say to Mr. Flatow and what did he say to you?

A. In lieu of the petition, he is authorized by the men to negotiate for a contract between us. I said I do that in lieu of the petition.

Q. Do you know whether or not your employees, particularly the fuel oil drivers and servicemen, had a meeting on February 15th, 1960 at the office of Reliance?

A. Well, they had a meeting—let me state it this way, and I am stating from fact: They all came together around six o'clock. They had a meeting for about a half-hour.

Q. Were you present at that meeting?

A. No.

Q. Was Mr. Packman present at that meeting?

A. No, sir.

Q. Was Mr. Flatow present at that meeting?

A. Yes, sir.

Trial Examiner: Just a minute. I just want to point out, Mr. Borenkind, if he wasn't there, he doesn't know who was and who wasn't there by himself.

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The Witness: Yes, I do know. I know that Mr. Packman wasn't there. I know I wasn't there.

Trial Examiner: Because he was with you at the time? [fol. 108] The Witness: Yes.

Trial Examiner: That he would know, yes.

All right, go ahead.

The Witness: I know that Mr. Flatow was in the back room conducting that meeting for about a half-hour. After that, Mr. Flatow came in and he said to me, "We are ready with a set of proposals."

I joined them for about fifteen or twenty minutes, and then they asked us to leave the room. This went on until about half-past ten, back and forth. Every time a set of proposals came forward, we discussed them, we left the room, they had a meeting of their own and came back with other proposals on whatever the issue was.

By Mr. Borenkind:

Q. And subsequently the agreement of February 15th, 1960 was executed by all parties?

A. That's right.

• • • • • • •

Cross-examination.

By Mr. Kupsinel:

Mr. Peckman, how long have you been in the fuel oil business now?

A. How long?

Q. Yes.

A. Approximately ten years.

Q. Approximately ten years?

A. Yes.

Q. Is this all with Reliance Fuel Oil?

A. Yes, sir.

Q. Have you ever had any so-called shape-up system before this year?

A. Yes, sir, on and off. I don't know what you call a shape-up system, because I, in my life, have been under a shape-up, so I know what a shape-up is. This is not a shape-up.

Q. I know it's been called a shape-up wrongly.

A. I know what a shape-up system is, and this was not a shape-up.

[fol. 109] Q. I mean the system that was inaugurated after the election, that is what I am referring to. Have you ever had a system like that before?

A. I will not call it a shape-up. We had occasions before—well, to begin with, the usual procedure is if you don't have any work you just tell the men you don't have any work. When a season comes on, you just don't lay off a man because you may need a man tomorrow, and it costs a lot of money to train a man to just know where addresses are. Therefore, you just don't lay off a man if you can help it, unless he is incompetent or unwilling to work.

Q. The question I asked you was if you ever had a system similar to the one that was inaugurated after the election in previous years with Reliance.

A. Yes, sir, but I used the method of laying off the man altogether.

Q. So it was a different system?

A. I wouldn't call it different.

I can also say occasionally we just kept the man on and paid him, even if he didn't work; more than one.

Q. In fact, that was the system that you had used regularly?

A. Not necessarily. I used it occasionally.

Q. But you never had a system where according to seniority you laid a man off and they rotated days that they worked?

A. Now, let me answer it this way: We never had a season the way this of 1959-60 that I can remember, where it was continuously warm for January, for December, January and February. Occasionally we get a spell of warm weather at one or two weeks, and on an occasion like that we just bear the loss. This was an extraordinary season as far as the record can tell you.

Q. And was that the only reason for the inauguration of [fol. 110] this system?

A. Yes, sir. I had the alternative of laying them off, which I did not choose to.

Q. I asked you if that was the only reason.

A. That was the only reason.

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Q. And you can't recall any other reason for this?

A. I do not recall any other reason for it.

Q. I show you this document, Mr. Peckman, and I want to ask you if it will refresh your recollection as to the reasons for this change.

(Witness examines document.)

A. All I can say is I am sorry to say that this situation was concurrent with this situation of the two locals coming in and fighting over this situation. And of course they could have interpreted it that way.

Q. But isn't it——

A. Now, let me say something further.

Q. Go ahead; finish it. I'm sorry.

A. This could have continued in March, regardless of who we signed with, although a stipulation in the agreement we signed with 355 is that we would do our best to keep all our men, but of course we needed them to work and they did work.

Q. Is it not a fact that one of the reasons was that since a union was going to come in, in any event that you told the men that you were going to have a union, you were going to have union rules here?

A. That's right, that's right. And in case—let me say —make the general statement, a business is carried not for anybody's benefit but for the fellow that invests the capital. You can have a regard for men, which I always did, to see that they make a living. I feel an obligation to do that, and I always did.

When you have a situation where—I wouldn't call it an outside influence, because men have a right to organize— [fol. 111] but where they come in and make it unprofitable for you to run a business, you adjust yourself to the condition. By adjusting yourself, you look up a situation, you see what are the rules of a particular situation you are going to live with, and you have a choice to accept them or get out of business.

Well, I am not a quitter, naturally. You have to adjust yourself to a situation where you have to live with it, and in a situation like this one is, you put aside your personal feeling—which was to see that a man makes a living—and you follow rules and regulations in order to stay in business.

Q. It is correct, though, at that time you were under no obligation to institute these union rules?

A. I was under no obligation, but I realized that this is going to be—that this is a situation that is going to remain, and, naturally, under the certain set of rules, you behave under these set of rules.

Q. But the rules were not as yet in effect as far as any obligation to a union?

A. I would rather say that I had to adjust myself to it.

Q. In anticipation; is that correct?

A. That's right.

Q. In your direct examination, you stated that you had spoken with Mr. Flatow and arranged this meeting on the 15th of February; is that correct?

A. Or the 14th.

Q. On the 14th?

A. Or the 14th or the 15th.

Q. You had that meeting because you felt that he was authorized?

A. That's right.

Q. By the men?

A. Yes.

Q. What was the basis of your conclusion that he was so authorized?

A. By this petition.

[fol. 112] Q. Will you then answer my next question after you read it?

Mr. Kupsinel: The witness is referring to Respondent's Exhibit 1.

A. Yes.

Q. This document states nothing about Local 355, does it, Mr. Peckman?

A. No.

Q. It merely requests that the employer not bargain with 553?

A. Yes.

Q. And yet, this is the basis by which you felt authorized to deal with Mr. Flatow?

A. That's right.

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Q. You had no other basis for dealing with Mr. Flatow aside from this petition?

A. That's right.

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By Mr. Levy: • • •

Q. Mr. Peckman, did I understand you correctly to say that the months of November and December of 1959 were abnormally warm and your business was abnormally poor?

A. That's right.

Q. Did I further understand you to say that there was a change in the working conditions of your employees on January 27th, or the day after?

A. Yes, sir.

Q. Did you make any change in the working conditions of your employees in the month of November, 1959, when the weather was abnormally warm?

A. Can I answer it——

Q. It requires a yes or no answer.

A. I won't give you a yes or no answer.

• • • • • • •

Trial Examiner: You can answer that question yes or no. I said I would allow you to explain it. You can still answer that question.

[fol. 113] The question is: Did you institute any changes in working conditions of your employees during the month of November, 1959?

I think you can answer that yes or no.

The Witness: No.

By Mr. Levy:

Q. Did you institute any changes in the working conditions of your employees during the month of December, 1959?

A. No; at my loss.

Q. Did you institute any changes in the working conditions of your employees during the first fifteen days of January, 1959?

A. No.

Q. Am I correct, though, that you did institute changes in the working conditions of your employees on or after January 27th, 1959?

A. Yes.

Q. At the time that you instituted these changes in working conditions, were you aware that the Board had held an election on January 27th, 1959?

A. Yes.

Q. Did you know what the result of that election was?

A. No.

Q. Did you know how the men had voted in that election?

A. Yes.

* * * * * * *

Re-direct examination.

By Mr. Borenkind:

Q. Normally, Mr. Peckman, when does a heating season start in this area, or the area of your operations?

A. The actual heating season starts in November and ends in March.

Q. Of the following year?

A. Of the following year.

Q. When can you best determine in the operation of your business as to whether you will have a good or a bad heating season?

A. There is no such thing. It works by averages. If [fol. 114] you divide it by half and you are behind, you are just behind.

Q. Let me take you to a period in January of 1960.

A. Yes.

Q. Compared with your previous heating season of 1958-59, was the 1959-60 heating season as good or better or worse than the previous season?

A. We were approximately twenty to twenty-five percent behind in business. Let me make a correct statement: On the basis of the same amount of accounts we have.

Q. Was that due to weather conditions?

A. Solely due to weather conditions.

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Trial Examiner: Mr. Peckman, at any time did Mr. Flatow offer to show you any cards signed by any of your employees, authorizing his union to represent them, or authorizing the check-off of dues, at any time prior to your signing the contract on February 15, 1960?

The Witness: I am sorry, I just couldn't follow your question.

Trial Examiner: Let me take it step by step.

Sometimes employees sign a card or a statement authorizing a union to represent them. Sometimes they sign cards such as the ones we have had in the hearing today authorizing their employer to deduct dues from their wages and pay it over to the union.

Now, prior to your signing the contract on February 15, 1960, did Mr. Flatow, or any other official of Local 355, ever show you any cards signed by your employees?

The Witness: No, sir.

[fol. 115] Trial Examiner: Would you tell me when your 1959-60 season began?

* * * * * * *

The Witness: In November.

Trial Examiner: And when did it end, or is it still going?

The Witness: It ended, it so happened, very abruptly, as it started, in March, and that is April 1st, for practical purposes.

Trial Examiner: For practical purposes, it ended on April 1st?

The Witness: Yes.

Trial Examiner: What was the heaviest part of that season?

The Witness: March. Unpredictably, it was colder than in any ten years.

Trial Examiner: In January there was a change in working conditions of the drivers. That did not affect the service employees?

The Witness: No, sir.

Trial Examiner: Just the drivers?

The Witness: Yes.

Trial Examiner: That continued until February when, the 15th?

The Witness: To February 15th, yes.

Trial Examiner: So it was in effect about three weeks or less?

The Witness: That's right.

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[fol. 116] Trial Examiner: During that period of three weeks or less, just what was the system used? Will you explain it to me carefully, among your drivers?

The Witness: What happened is, when we find that we don't have sufficient work for all the trucks, we naturally told them we are going to send out either four or six trucks instead of ten or twelve, and told them that a day before and sent out those people that have had seniority rights; in other words, those that worked longest.

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Trial Examiner: I want to get a few more facts.

You say you announced to them the day before how many trucks would go out the next day?

The Witness: Yes.

Trial Examiner: And whether they would be needed the next day?

The Witness: That's right.

Trial Examiner: If they were told they wouldn't be needed the next day, they didn't show up the next day.

The Witness: That's right.

Trial Examiner: Now, let's suppose on Monday night you told a man, "We won't need you Tuesday."

Now would he know whether to report on Wednesday or not? Would he be notified, or would he call in?

The Witness: He would call in.

Trial Examiner: He was told to call in some time during [fol. 117] the day Tuesday to find out if he would be needed on Wednesday; is that it?

The Witness: Well, the thing isn't that clear-cut, because we did this for a matter of saving money.

Now, when we told them there is no work on Tuesday, it almost always meant that there will be work the next day, because we can't cut ourselves out. We just try to reduce our expenses.

Trial Examiner: How would the man know? He would be told to call in on Tuesday?

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The Witness: That's right; or come in.

Trial Examiner: Call in or come in to find out if he would be needed Wednesday?

The Witness: That's right.

Trial Examiner: But you didn't require him to report in person; a phone call would be enough?

The Witness: Yes.

Trial Examiner: And you would know a day before when he would be needed?

The Witness: Yes.

Trial Examiner: During that three-week period, did you tell a man to report the following day and when he got there you didn't have work for him and sent him home?

The Witness: I would say the opposite was the case. I would never do a thing like that.

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Trial Examiner: Were there cases where you told a man not to come in the following day and then the following day you needed him?

The Witness: That's right.

[fol. 118] Trial Examiner: You did have that happen?

The Witness: I think on one or two occasions that happened, and they weren't even available. That is, we needed them and they weren't available.

Trial Examiner: During that three-week period, how many drivers did you have working?

The Witness: Either eleven or twelve.

Trial Examiner: Eleven or twelve drivers?

The Witness: Yes.

Trial Examiner: What was the average number of drivers who worked during that period?

The Witness: Well, anywhere from four to all twelve.

Trial Examiner: It would vary from four up to twelve?

The Witness: Yes.

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Re-cross-examination.

By Mr. Levy:

Q. What is the first day this system of the new condition of work went into effect?

A. Maybe around February 3rd, 4th, or something like that.

Q. That was the first day on which there was less than a full crew working under this new system?

A. Yes.

Q. February 3rd or 4th?

A. Or 5th; I am not sure.

Q. On whichever day this was, what was the size of your crew running? It was a reduced crew, but what was the size of it?

A. Maybe four or five drivers. You mean total crew.

Q. What is your usual crew? How many trucks?

A. Well, around ten or eleven.

[fol. 119] Q. How many did you have running on the first day this system went into effect?

A. Probably four.

Q. So seven were laid off, or were not working, and four were still working; is that correct?

A. Well, I wouldn't say so. Maybe six were working, or five.

Q. Four, five or six were working?

A. Yes; or seven. I am not sure.

Q. Or seven?

A. Yes.

Q. So that four, five or six or seven were not working, depending upon how many were working?

A. Yes.

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HAROLD PACKMAN, called as a witness by and on behalf of the Respondent and, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

* * * * * * *

By Mr. Borenkind:

Q. Do you recall that on or about January 27th, 1960, the Board conducted an election among your service men and fuel oil drivers at Reliance's premises?

A. That's right.

Q. Following such election, did Reliance adopt or put into effect a work policy which was different than the one prior to the election?

A. Yes, we did.

Q. What was the nature of that work policy?

A. Well, we split the work. We cut back on our costs.

* * * * * * *

By Mr. Borenkind:

Q. On the work policy that was adopted the day following the election, will you tell us the reason for adopting [fol. 120] that policy?

A. We felt we were past the peak, we were in no trouble at all, and being the season was that bad we just as well might try to save some money.

Q. How bad was the current season as compared to the previous season?

A. Well, without the addition of new accounts, we were about twenty per cent below our true deliveries of the year.

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Cross-examination.

By Mr. Kupsinel:

Q. Mr. Packman, this change in working conditions that took place after the election, do you recall the dates when it started and ended?

A. I believe it was the first Tuesday after the election.

Q. Do you recall what day of the week the election was held on?

Trial Examiner: Would a calendar help?

A. If you have the date, you know what day it was.

Mr. Kupsinel: It was the 27th.

Trial Examiner: The date of the election is shown in the records as January 27th.

I am handing the witness a 1960 calendar.

A. January 27th was on a Wednesday.

Q. The next Tuesday, you say?

A. Yes, the following Tuesday.

Q. That would be February 2nd?

A. I believe that is correct.

Q. And the changed working conditions continued until what date?

A. They continued until after we signed the contract with the Local.

[fol. 121] Q. The date of the contract, I believe, is the 15th of February?

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A. Yes.

Q. And you think it was the day after that?

A. Well, that was the basis; that was one of the facts in the contract.

Q. In other words, that would make the change end on the 16th, or approximately the 16th?

A. Or maybe a week after. I really don't know the exact date.

Q. Shortly after the contract was signed?

A. A week or so after.

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Q. Isn't it a fact that right after this election you felt since there was going to be a union in any event, you might as well work according to union rules and that is why you instituted this change in working conditions?

A. It is not because they were going to have a union. It is because at that time we felt it is just costing too much and let's cut back.

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Q. That was the only reason? That was the reason.

Q. Because of the warmer weather?

A. That is correct. We would have done it before, but we couldn't have—we didn't want to take the chance.

Q. If you can recall, Mr. Packman, on April 7th of this year I had a meeting with you and Mr. Borenkind in Mr. Borenkind's office?

A. Yes.

Q. The purpose of that meeting was to ascertain facts about your business for the purposes of commerce information?

A. Yes.

[fol. 122] Q. While I was there, without questioning from me you stated that since there was going to be a union anyway, you thought you would operate under the union rules. Do you recall making that statement?

A. Well, let's put it this way: That is something that coincided with the situation of the weather.

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By Mr. Levy:

Q. I call your attention, Mr. Packman, to the evening of February 15th, 1960, the evening when the contract was signed.

On that evening did Mr. Granger, accompanied by certain other of your employees, approach you and speak to you about the question of signing the contract?

A. Not that I remember.

Q. Do you remember Mr. Granger telling you that the employees would not sign a contract because there was still a Board matter pending?

A. I don't remember that, either.

Q. Do you remember answering to Mr. Granger, "What's the matter; don't you want to work here any more?"

A. No. The only thing that I believe I remember saying to the gentleman is that there was a contract here, and as long as it is required to sign a contract, or there is a union here; I imagine that was the rules that the men would work by, and if they weren't members of the union then they couldn't work for the organization.

* * * * * * *

Q. Am I correct in understanding that in your earlier testimony you said that February 2nd was the first day on which this new system of working conditions was in-
[fol. 123] stituted?

A. Either that Tuesday or the previous Thursday, one of the two.

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MURRAY FLATOW, called as a witness by and on behalf of the Party to the Contract, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

Direct Examination.

By Mr. Eltman:

Q. What is your business, occupation, or field of endeavor?

A. I am the president of Amalgamated Local Union 355.

Q. Is that Local affiliated with any International Union?

A. Yes, it is.

Q. What International Union?

A. The R.W.D.S.U, AFL-CIO

Q. Are you on a full-time basis with Amalgamated Local 355?

A. Yes, I am.

Q. As part of your work, do you organize employees?

A. Yes, I do.

Q. Do you negotiate contracts in their behalf?

A. Yes, I do.

Q. When for the first time did you begin organizing the employees of—withdrawn.

Did you organize the employees of the respondent employer Reliance Fuel Corporation?

A. Yes, I did.

Q. When for the first time did you organize any of the employees?

A. The very first time I met their workers?

Q. Yes.

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A. It was in the winter of 1958.

[fol. 124] Q. Did anything come about as a result of those organizational efforts?

A. At that time, no.

Q. When next did you organize the employees?

A. At the beginning of the winter in 1959.

Q. Did you secure designation cards?

A. Yes, I did.

Q. Were those designation cards you secured similar to the one contained in Party to the Contract Exhibit No. 1?

(Witness examines documents.)

A. They were other cards. They were similar to these cards, but they were other cards.

Q. I call your attention to the fact, Mr. Flatow, that all of the cards contained in Party to the Contract Exhibit No. 1 bear a date of February 16th, 1960 or later. What happened to the cards that were procured by you prior to February 16th, 1960?

A. We have these within our files.

* * * * * * *

By Mr. Eltman:

Q. You say you secured cards prior to the date of February 16th?

A. Yes.

Q. How early? What would be the earliest date upon which you procured them?

A. The beginning of October.

Q. Do you know what happened to those cards?

A. We have them in our files.

Q. Were those cards ever delivered to the National Labor Relations Board?

A. Yes, they were.

Q. Were they delivered in connection with a representation proceeding?

A. Yes, they were.

Q. How many times did you have employees sign cards?

A. Twice.

Q. On what occasions?

A. When we had signed up the employees at meetings at

the beginning of October, after the contract had been signed [fol. 125] we had people sign them again. There was a reason for it.

Q. Will you tell us the reason?

A. A lot of the fellows felt that there was friction going on between the men because of the fight between the two unions, and that after we have a contract now let's all sign these cards so once and for all they are all done.

Q. Will you describe the type you use? Is it a single or a double card?

A. It's a double card.

Q. Do the men sign both parts of it?

A. They fill out and sign both parts.

Q. What is done with each of the cards?

A. Half of the cards are kept in our files, the other in the employer's files.

Q. After the election of January 27th, did you receive a telephone call from any of the employees of Reliance?

A. I received several calls.

* * * * * * *

By Mr. Eltman:

Q. Do you recall the names of the employees?

A. I recall the name of one of the employees.

Q. What was that? Who was that employee?

A. Joseph Mendolia.

Q. What did he say to you and what did you say to him?

A. He phoned and when we spoke he said that they now are on a three and a four-day week. I have to keep it as clean as possible. He said they are on a three and a four-day week.

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A. That is there anything 335 could do, that we could do. At that time I told him that I would have to contact our attorney to find out if there is some sort of a legal [fol. 126] way a petition could be drawn up and signed by the rest of the men that they are willing to do something, and I would contact them as soon as I know.

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Q. What did he tell you about 553?

A. That he had contacted 553, and others had, and they were told nothing could be done until after a decision had come back from Washington.

Q. Did he ask you to do something?

A. He said, "We can't wait that long, they don't know how long it's going to be;" could we do something, because they can't live on three or four days a week.

Q. What action did you take as a result of that?

A. I called you and I asked you what sort of a petition we could draw up, if any, and you dictated a petition to me.

Q. Before we go into that, what is my relationship to Amalgamated Union Local 355?

A. You are our attorney.

Q. And was I your attorney at that time?

A. Yes.

Q. What did I tell you to do?

A. You dictated a petition to me over the phone and told me that once I had it typed up to have the men sign it. I typed it up myself and I delivered the petition to Ray Haff, and I told Ray——

Q. Who is Ray Haff?

A. Ray Haff is one of the employees at Reliance.

I told Ray that this is what the men have asked for, and if they mean what they say, here it is. When you have the names on it, let me know and we will take the ball from there.

Q. Did you ever get that petition back?

A. Yes, I did.

Q. Was it signed singularly or in duplicate?

A. It was signed in duplicate.

[fol. 127] Q. And what did you do with one of the copies?

A. One copy we kept in our files, and the other copy was mailed to Reliance.

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By Mr. Eltman:

Q. Did you take any other action with respect to or on behalf of these employees?

A. We called for a meeting of the employees prior to February 15th. In fact, there were two meetings.

Q. How did you call that meeting?

A. I contacted some of the men at home by telephone.

Q. When were those meetings held?

A. One, I remember, was the 14th, the night before we met to negotiate a contract. The one before that, I don't recall the date.

Q. Did you serve any further notification upon the employer?

A. We sent a telegram to the employer, I believe it was the 14th, the night we were to have the meeting with the men.

Q. Is that telegram Respondent's Exhibit 2 that you are talking about?

A. Yes. And at the same time I also phoned the employer later on in the afternoon to make sure he received that telegram and would be available on the 15th.

Q. When you refer to the employer, with whom did you have that conversation?

A. I believe it was Mr. Packman.

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Q. Was such a meeting held?

A. Yes. It was held about 6:30 on the 14th.

Q. Did you say the 14th?

A. On the 14th, the night before the negotiations was held.

Q. Who was present at that meeting?

A. Mr.—well, I remember I took a count. There were [fol. 128] fourteen people present.

Q. Is this the meeting among the membership, you mean?

A. Among the membership.

Q. Were any of the employers there?

A. No. We didn't meet in the plant.

Q. We are talking of a meeting with the union membership only?

A. Yes.

Q. That was on the 14th?

A. Yes.

Q. Then you met again on the 15th?

A. That's right.

Q. This was a union membership meeting, too?

A. On the 15th we had made demands on the employer

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and we wanted to meet for the purpose of negotiating a contract.

Q. Did you meet with the employer on the 15th?

A. Yes, we did.

Q. How many employees were present?

A. I believe eighteen employees were present.

Q. We have had testimony in the record concerning negotiations back and forth. Do you recall when that meeting broke up, when the negotiation meeting broke up?

A. I remember exactly when it broke up. I had to phone my wife, I missed an appointment.

Q. At what time?

A. At 10:30.

Q. There was a contract signed that night?

A. That's right.

Q. Is that the contract that is in evidence as General Counsel's Exhibit 4?

A. That's right.

Q. During the negotiations, did any question arise concerning what has been described as a shape-up system of work?

A. Well, let me say this: That I always make it a practice in negotiations—I am not an attorney, so I don't know what you would call it. Before I start negotiations, [fol. 129] I make two statements that I want understood clearly by management:

One was that whatever took place in the past regarding how people felt and their personal beliefs was not to be held against them.

Number two, that the past practice that management has had regarding the so-called shape-up, Local 355 does not have any shape-up within its organization, and that we wouldn't stand for a shape-up in the future.

It was then, from then on, we negotiated a contract.

* * * * * * *

Cross-examination.

By Mr. Kupsinel:

Q. Mr. Flatow, you gave testimony of the fact that certain authorization cards were signed in October and were in the files of the National Labor Relations Board in

regard to the representation case that we have referred to throughout these proceedings; is that correct?

A. That's right.

Q. Do you recall how many such cards were there?

A. I don't recall right now.

Q. You don't recall?

A. No.

Q. You say the employees signed cards twice?

A. That's right.

Q. But you didn't specify as to which or how many employees signed first and the second time, if they were the same. Would you kindly explain that?

A. The same employees who signed originally, signed again.

Q. Signed again when?

A. After the contract was signed.

Q. There were no additional employees who signed after the contract was signed?

A. Yes, there were.

[fol. 130] Q. There were?

A. Yes.

Q. But you don't recall how many more signed the second time who did not sign the first time?

A. I don't recall.

Q. You stated a meeting was held on the 14th among the members of Local 355?

A. Excuse me; among the workers of Reliance.

Q. You mean among the employees of Reliance?

A. That's right.

Q. They were not all members of the union at that time; is that correct?

A. That's right.

Q. This meeting that took place on the 15th, at the time the contract was negotiated, were only employees present at that meeting?

A. There were two meetings, actually, that evening. There were some employees who weren't there the night before and we had a meeting for about a half-hour and we asked management to excuse us, and we met alone.

Q. At what time was this, about?

A. At six o'clock.

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Q. And you met alone with these employees who had not attended the meeting the previous day?

A. I met with all the employees in addition to the ones who didn't attend, not only the ones who didn't attend.

Q. So it was a continuous meeting, but the first part of it was to familiarize these employees who had not been to the meeting before?

A. That — right.

Q. There was no one else there besides you and the group of employees; is that correct?

A. From 6 to 6:30, there was no one else there.

Q. And after 6:30?

A. We called management in and we negotiated the contract.

[fol. 131] Q. When you say management——

A. Mr. Packman and Mr. Peckman.

• • • • • • •

By Mr. Levy:

Q. Mr. Flatow, you said that you made two things clear when you began the negotiations. Did you make those things clear to the employer?

A. It was to the employer.

Q. Particularly what individuals representing the employer did you make it clear to?

A. Which individuals of the employer?

Q. Yes. Who did you make your statements to?

A. Mr. Peckman and Mr. Packman were both present together. It was made to them both.

Q. And you told them that the shape-up system could no longer be continued; is that right?

A. That's right.

Q. What was their reply?

A. I don't think they made a reply.

Q. They didn't say anything to you about business conditions at that time requiring it, or anything like that?

A. No reply was made.

• • • • • • •

Trial Examiner: Let's get the date you mailed the petition. You mailed it on the 10th?

The Witness: Yes.

Trial Examiner: The telegram was sent when?

The Witness: I believe it was sent on the 14th, the day that I was supposed to meet with with the employees.

• • • • • • •

Trial Examiner: Were you ever asked for a proof of majority?

The Witness: We had been asked for proof of the ma-[fol. 132] jority, I think, by Mr. Packman at one time. I don't recall. But the fact is that we had a petition signed by a majority of the employees.

Trial Examiner: What petition are you referring to?

The Witness: The one stating they didn't want to be represented by Local 553.

Trial Examiner: That didn't mention your union?

The Witness: No. But they had come to us for the petition.

Trial Examiner: Were you ever asked to exhibit the cards you had?

The Witness: I believe one time I was asked.

Trial Examiner: By whom?

The Witness: By Mr. Packman.

Trial Examiner: Did you comply?

The Witness: Yes, I did.

Trial Examiner: When was that?

The Witness: I think this was the night of the 15th.

Trial Examiner: At the meeting out at the plant?

The Witness: Yes.

Trial Examiner: And you had them physically with you at that time?

The Witness: Yes.

Trial Examiner: And you showed them physically to him?

The Witness: Yes.

Trial Examiner: Did he look through all the signatures?

The Witness: No, he didn't look through all of them.

[fol. 133] Trial Examiner: Did he count the number of cards?

The Witness: I don't remember if he counted them.

Trial Examiner: But he did see a stack of cards?

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The Witness: Yes.

Trial Examiner: Then you put them back in your briefcase or file?

The Witness: Yes.

Trial Examiner: You didn't leave them with him?

The Witness: No.

* * * * * * *

By Mr. Kupsinel:

Q. These cards you refer to that you showed to Mr. Harold Packman on or about the 15th of February, in my prior questioning of you I believe you stated these cards had been sent to the National Labor Relations Board?

A. Half of them were. Our cards are made in duplicate.

Q. Half of them?

A. Yes.

Trial Examiner: Are they perforated, and you can tear off a half?

The Witness: Yes.

* * * * * * *

Mr. Kupsinel: I am trying to find out which cards he was showing to Mr. Packman.

By Mr. Kupsinel:

Q. I understand now you kept both halves of these. Half of them were sent to the Board and you showed Mr. Packman the others?

A. That's right.

Q. As to the number of these, you don't recall how many there were?

A. I don't recall the number.

[fol. 134] Q. You don't recall if there were a majority of the employees?

A. I don't recall.

* * * * * * *

Trial Examiner: Let me ask you this, before we get off the subject of commerce and before we get off the subject of Mr. Vangeli's letter and the question of Gulf Oil:

Do you see any reason why the Trial Examiner should not take official notice of the fact that Gulf Oil Corporation is engaged in interstate commerce? Do you think that is a fact so well known that the Trial Examiner could take official notice of it without proof?

If you don't want to answer this now, you can answer it in your brief.

Mr. Borenkind: No, I will answer it right here and now.

It just so happens I am an outside attorney for Gulf Oil Corporation and am familiar with their operation, and will take the position before Mr. Asher and the Board that Gulf Oil Corporation is definitely engaged in interstate commerce. There is no question about that.

Trial Examiner: And you wouldn't require that there be proof of that fact?

Mr. Borenkind: No, sir.

Trial Examiner: That is well enough known that I could take notice of it without bringing one of its officials in here to so testify?

Mr. Borenkind: So far as I am concerned, you can take official notice.

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[fol. 135] GENERAL COUNSEL'S EXHIBIT 3.

Law Department
Gulf Oil Corporation
17 Battery Place

New York 4, N. Y.

DAVID T. SEARLS:

General Counsel, Pittsburgh, Pa., Attorneys, New York City.

FREDERICK L. SCOFIELD:

Divisional Attorney.

DUNCAN NOBLE, ARTHUR L. VANGELI, THOMAS M. HEALY.

Please Refer to File Number

April 4, 1960.

Bertram Kupsinel, Esquire,
National Labor Relations Board, Second Region, 745 Fifth Avenue, New York 22, N. Y.

Re: Reliance Fuel Oil Corp.,

Case No. 2-CA-7280

Dear Sir:

Following is the information requested by your letter of March 31, 1960 (Question No. 2 being revised in accordance with our telephone conversation).

[fol. 136] *Introductory Statement*

Gulf Oil Corporation is engaged in non-retail and retail business; sales and other operating revenues (including consumer excise taxes) for 1959 according to Annual Report amounted to $3,170,847,000.

Question No. 1: What was the gross amount of sales of all items sold to Reliance Fuel Oil Corp. during a twelve-month period?

Answer: For year 1959: $669,805.

Question No. 2: Were most of the products sold by Gulf Oil Corp. to Reliance received by Reliance from sources outside the State of New York?

Answer: At present time, most of product delivered to

Reliance is refined outside state and delivered into Gulf's terminal storage within state (New York City); redelivered into local Gulf storage on Long Island (not segregated for this customer); again redelivered to customer at or from Gulf's local Long Island storage.

Yours very truly, A. L. Vangeli.

alv/h

[fol. 137] GENERAL COUNSEL'S EXHIBIT 4

MBF HP Agreement, made as of *February 15, 1960* by and between Amalgamated Local Union 355, having its principal office at 74-09 37th Avenue, Jackson Heights, N. Y., (hereinafter called the "Union"), acting for and on behalf of itself and the employees covered by this agreement now employed, or hereafter to be employed by the Employer, and

MBF HP *Reliance Fuel Oil Corp.*
500 Hicksville Rd.
Massapequa, N. Y.

Witnesseth:

In consideration of the mutual covenants, provisions and conditions of this Agreement, and other good and valuable considerations, the parties hereto agree as follows:

Article I—Recognition

a) The Union represents that it has been designated by the majority of the Employer's employees, in the bargaining unit hereinafter described, as the collective bargaining agent of said employees and has exhibited to the Employer collective bargaining authorizations signed by a majority of such present employees of the Employer. The Employer recognized the Union as the sole bargaining agent of all employees of the Employer in the bargaining unit.
b) The bargaining unit covered by this agreement consists of:

MBF HP Fuel Oil Drivers—*Oil Burner Service Men*

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[fol. 138] Article II—Union Security

a) All present and future employees covered by this Agreement shall, on or after the thirtieth (30th) day following the beginning of such employment or the effective date of this agreement, whichever is later, join the Union and shall thereafter remain members of the Union as a term and condition of employment.
b) In the event an employee is declared by the Union not to be in good standing, the Union shall notify the Employer in writing of such fact, and the parties shall have ten (10) business days time to adjust the matter. Should the matter not be adjusted within the allotted time, when the employee in question shall be discharged from the employ of the Employer.

MBF HP *c) Good standing shall mean the payment of uniform dues.*

Article III—Bulletin Board

The Union shall have the right to post notices on a bulletin board which shall be provided by the Employer. Said bulletin board shall be placed in a conspicuous place.

Article IV—Real Party in Interest

It is agreed that this contract shall not vest or create in any employee or group of employees covered thereby, any rights or remedies, which they or any of them can enforce either at law, equity or otherwise, and whether as principal or third party beneficiary or otherwise, it being understood and agreed on the contrary that all of the rights and privileges created or implied from this contract shall [fol. 139] be enforceable only by the parties hereto and only in the manner established by this contract.

Article V—Sanitary Shop

The Employer shall keep its premises in a clean and sanitary condition, protect the machinery, equip its premises with a medicine chest containing the necessary medicines and bandages for use in emergency cases, and carry insurance in the manner provided by the "Workmen's Compensation Law" of the State of New York.

Article VI—Plant Visitation

Any official representative of the Union shall be permitted to visit the Employer's premises during working hours, with permission of the management and provided that such representative shall first report in at the office of the Employer, and provided further that such Union representatives shall in no manner interfere with the work of any employees and shall at all times comply with plant rules.

Article VII—Shop Steward

MBF HP *Elected Employees*

A shop steward shall be ~~appointed~~ by the ~~Union~~ whose duty it shall be to see that there is no violation of this Agreement. Under no circumstances shall said employee be discriminated against by reason of being the shop steward. The shop steward shall have top seniority.

[fol. 140] Article VIII—No Discrimination

The Employer agrees not to discriminate against any employee because of Union activity or because of race, color or creed.

Article IX—Right to Hire and Fire

a) The Employer shall have the right to hire without regard to Union membership or lack of Union membership, such employees as it deems necessary for the efficient operation of its plant.

b) All new employees shall be hired upon a trial basis and the Employer shall have the absolute right to terminate any employee thus hired at any time within the first four (4) weeks of their employment.

c) The Employer shall have right to terminate any employee for any good cause. The Union shall have the right to challenge such discharge within five (5) days thereof and in the event that the Union challenges such discharge, the same shall be a*k*justed as a grievance as hereinafter provided in this Agreement. Pending final disposition of said grievance, the employee need not be retained on the job by the Employer, but in the event that the employee is

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not retained on the job by the Employer, the arbitrator shall have the right, in his discretion, if he so determines, to order the reinstatement of such employee with or without back pay.

Article X—Adjustment of Disputes

a) All disputes, complaints, controversies, claims and grievances arising between the Employer and the Union [fol. 141] or any employees, with respect to, concerning or growing out of the interpretation, operation, application, performance or claimed breach of any of the terms and conditions of the Agreement, whether or not the same may be the subject of an action, shall be adjusted in accordance with the following procedure:

b) The matter shall first be taken up between a representative of the Union and the Employer within five (5) days after such dispute has arisen. If the said dispute shall not be adjusted within five (5) days thereafter, then the matter shall be submitted to arbitration upon forty-eight (48) hours' written notice by either party to the other.

c) The arbitrator shall be selected by both parties by mutual agreement. In the event that both parties shall fail to mutually agree on an arbitrator within forty-eight hours, either party may ask the New York State Board of Mediation to appoint an arbitrator and such appointee shall be the arbitrator in the matter involved. The decision of the arbitrator shall be final and binding upon both parties and shall be fully enforceable in law or in equity. It is expressly understood and agreed, however, that the arbitrator shall not have the power to amend, modify or alter, or in any way add to, or subtract from, this Agreement, or any provision thereof. The cost of arbitration shall be shared equally by the Employer and the Union.

Article XI—Seniority

a) The Employer shall have the right to lay off his employees according to the needs and requirements for the [fol. 142] successful efficient operation of his business. The lay-off shall be effective on the basis of seniority, according to the requirements of the operation and with due con-

sideration being given to whether the employee has the knowledge and ability to perform or operate the particular work or machine involved.

b) All present employees shall be entitled to seniority rights. All new employees who have completed four (4) weeks of continuous employment shall be entitled to seniority rights.

c) All lay-offs shall be in inverse order of seniority; that is, the last person hired shall be the first person laid off. In the event that the Employer decides to rehire any employees so laid-off, they shall be rehired in the order of seniority; that is, the last person laid-off shall be the first person to be rehired, provided that any employees on lay-

MBF HP *1st*

off during the period of April ~~15th~~ to October 15th, who desire to be rehired must, on October 15th (or if the same falls on a Sunday or a holiday then on the next business day) report to the Employer and sign a

MBF HP *or send telegram*

roster ^ signifying his desire to be rehired, otherwise he forfe-ts his seniority and right to be rehired.

Article XII—Check Off

The Employer agrees to deduct all Union membership dues and initiation fees as provided in the authorization form set forth below, upon condition that at the time of such deduction, the Union shall furnish the Employer with a written authorization executed by the worker substantially in the following form:

> [fol. 143] "I hereby authorize and direct my employer to deduct from my wages, and to pay over to Amalgamated Local 355, such amounts, including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted."

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The Employer will notify the Union promptly of any revocation of such authorization received by it.

This authorization shall automatically renew itself unless written revocation is submitted as directed above.

Any moneys deducted from the employees are to remain the property of the Union, and in no event shall the Employer be permitted to use said moneys for any other purpose, but as stipulated above.

Article XIII—Waiver or Modification

Neither the Employer nor any employees or group of employees shall have the right to waive or modify any provisions of this contract, without the written authorization of the Union.

Article XIV—No Strike, No Lockout

There shall be no strike, stoppage of work, slow down, picketing, boycotting, lockout or any other economic pressure or activity of any kind by either party against the other for any reason or matter, controversy or grievance, [fol. 144] or claim of breach of contract of any kind, nature or description, between the parties hereto arising in any manner out of any dispute either between or among any of the parties or any of the employees with respect to the meaning, scope, intent, operation, interpretation or applicability of this Agreement, or the performance of breach thereof, or any matter or thing between the parties hereto or any employees, whatsoever, during the duration of this contract. All such controversies, grievances, etc. to be governed and finally settled by Article X above.

Article XV—Welfare Fund

a) The Employer hereby agrees, as long as this contract remains in force, to contribute monthly, on or before the 10th day of each month to the Local 355 Welfare Fund, the sum of Four Dollars ($4.00) per week for each employee covered by this agreement. The sum contributed shall be used by the said Welfare Fund for the purpose of financing the Welfare Plan for the benefit of said employees which shall provide: Blue Cross & Blue Shield, Maternity Benefits, General Medical, In Hospital Medical, For the em-

ployee, his spouse and children (up to the age of eighteen). Life Insurance—a $3,000.00 Life Insurance Policy with double indemnity for each employee.
b) The Union agrees that the said Welfare Fund shall, at all times and in all respects, comply with all the laws and regulations governing such Fund, and the Employer shall have all of the rights of contribution Employers provided for by law and the Declaration of Trust relating to said Welfare Plan.

[fol. 145] Article XVI—Regular Work Week and Work Day

a) The normal work week of the Employees covered by this Agreement shall be five (5) days per week, eight (8) hours per day, forty (40) hours per week, Monday
MBF HP through Friday inclusive. *Seasonal Men to be guaranteed 40 hrs. from November 1—March 1.*

MBF HP b) Should any employee work in excess of *Forty-Eight* *week*
~~eight (8)~~ hours in any one ~~day,~~ he shall be paid
MBF HP overtime at the rate of time and one half. ~~All work performed on Saturday shall be paid for~~
MBF HP ~~at the rate of time and one half.~~ All work performed on Sunday shall be paid for at the rate of ~~double time.~~ *Time and one half.*

Article XVII—Holidays

A) New Years Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving, Christ-
MBF HP *mas, Employee's Birthday.*

MBF HP *B) Good Friday, Employee's Birthday to be guaranteed.*

MBF HP *C) All work performed on above to be paid for at the rate of double time.*

Article XVIII—Vacations

A) 1 year —1 week
MBF *2 years—2 weeks*
10 years—3 weeks

MBF HP *B) Seasonal employees to earn one (1) days vacation for every ten (10) weeks worked.*

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[fol. 146] Article XIV—Wages

The wages for the employees covered by this agreement shall be as set forth in Schedule "A" annexed hereto.

Article XX—Pension Fund

5¢ per hour

The Employer will pay into a pension fund ^ in accordance with a plan to be agreed upon between the
MBF HP Employer and a committee of the employees to be selected by the employees, such plan to be approved by the United States Government.

Sick-Leave

One (1) day for every Ten (10) weeks worked.
MBF HP *Unused Sick Leave to be paid for each year.*

Article XXI—Duration and Reopening

This contract shall be and continue in full force and effect from the date of execution thereof, to the includ-
MBF HP ing the *15th* day of *February 1962* and this contract shall automatically renew from year to year thereafter, unless notice by registered mail is given by either party to the other not less than sixty (60) days prior to the current termination date thereof, of intention to modify or terminate this Agreement.

On *February 1, 1961* the Union shall have the unlimited right to seek a revision of wages, and other work-
MBF HP ing conditions. The parties shall negotiate for a period of thirty days. In the event of failure by the parties to agree on such revisions, the disagreement shall become a dispute hereunder and shall be subject to the arbitration provisions of this Agreement.

[fol. 147] In Witness Whereof, the parties have caused these presents to be signed and sealed by their respective officers thereunto duly authorized, the day and year first above written.

Amalgamated Local Union 355, By Murray Flatow, (Pres.); By Harold Packman, Sec't. Reliance Fuel Oil Corp.

Raymond E. Haff, William Cotgreave, Richard Mott, Salvatore J. Seddio, Ralph R. Cumber, Merrill T. Weaver, Henry Mysliwiec, Vincent Graziano, Frederick Mysliwiec, Blaise Graziano, Frederick Johnson, Len Kern, Ted Sammis, R. Granger, Carl Ackerman, Frederick Kerlinger, Benjamin Mendolia, Donald Kershaw, Joseph Mendolia.

[fol. 148] Schedule "A"

MFB HP Fuel Oil Drivers—~~$2.95~~ *$2.90* Per Hour
MFB HP *Oil Burner Service Men—$2.90 Per Hour*

Matter in italics was handwritten in original General Counsel's Exhibit 4.

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GENERAL COUNSEL'S EXHIBIT 5

Cohen and Weiss
Counsellors at Law
50 East 42nd Street
New York 17, N. Y.

MUrray Hill 2-6077.

Samuel J. Cohen, Henry Weiss.

March 16, 1960.

Mr. Harold Packman,
Reliance Fuel Oil Corp., 500 Hicksville Road,
Massapequa, L. I., N. Y.

DEAR MR. PACKMAN:

I am writing to you on behalf of Local 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. As you know, Local 553 has been certified by the National Labor Relations Board as representative of your drivers and servicemen for purposes of collective bargaining.

Local 553 now requests an appointment to meet with you to conclude a collective bargaining agreement covering [fol. 149] the wages, hours and working conditions of your employees in the above classifications.

We propose, as an appropriate date for our meeting Friday, March 25, 1960, at which time we would meet at a place convenient to you. Would you kindly respond either to this office or to the Union at an early opportunity.

Very truly yours, Cohen and Weiss, By Herbert A. Levy.

HAL:EK

Special Delivery—Certified Mail—Return Receipt Requested.

[fol. 150] GENERAL COUNSEL'S EXHIBIT 6

Samuel H. Borenkind
Counselor at Law
REctor 2-6691-2
135 Broadway
New York 6, N. Y

March 21st, 1960.

Cohen and Weiss, Esqs.,
50 East 42nd Street,
N. Y. C., 17, N. Y.

Re: Local 553, International Brotherhood of Teamsters, Chauffeurs, etc.,
Att: Herbert A. Levy, Esq.,

DEAR MR. LEVY:

Your letter dated March 16th 1960, to my client, Reliance Fuel Oil Corp., has been referred to my office for response.

Prior to the alleged certification of your client each of the interested employees of Reliance signed a petition requesting that the employer bargain on their behalf with Amalgamated Local Union 355, and as a result an agreement was entered into with the latter union on or about the 15th day of February, 1960.

Since there is now in existence a labor contract with the interested employees with a Union of their choosing I do not see how we can comply with your letter.

Yours very truly, S. H. Borenkind.

[fol. 151] shb/lc.,

cc to: Mr. Harold Packman, Amalgamated Local Union 355.

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RESPONDENT'S EXHIBIT 1

From the employees of Reliance Fuel Corp., 500 Hicksville Road, Massapequa, L. I., N. Y.

To: Reliance Fuel Corp., 500 Hicksville Road, Massapequa, L. I., N. Y.

GENTLEMEN:

We the undersigned employees representing an overwhelming majority of the employees employed by Reliance Fuel. Corp. Do hereby request our employer not to sign an agreement with Local 553 of the Teamsters Union.

Some of us during the recent election conducted by the N. L. R. B. voted for 553 of the Teamsters Union. We hereby re-cind such vote having changed our mind concerning our desire to be represented by Local 553 of the Teamsters Union.

Dated February 2, 1960.

Fred Mysliwiec, Richard Mott, Raymond E. Haff, Henry [fol. 152] Mysliwiec, Ralph R. Cumber, Frederick F. Kerlinger, John R. McGarry, Salvatore J. Seddio, Wm. Cotgreave, Frederick R. Johnson, Vincent Graziano, Joseph Mendolia, Reo. Messina, Donald Kershow, Len Kern, Barry McDad.

RESPONDENT'S EXHIBIT 2

Western Union Telegram

WU021 PD TDAS Jackson Heights NY 15 1100 AME Reliance Fuel Oil Report Delivery

500 Hicksville Rd Massapequa NY

Attn Harold Packman We Represent a Majority of Your Employees and We Demand That You Sit Down With Us and Sign a Contract Covering Wages and Conditions for Your Employees. We Will Contact You to Set Up An Appointment to Discuss the Above

Amalgamated Local Union 355 7409 37 Ave Jackson Heights 72 NY

This Is Report Delivery Pls Advise Us.

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[fol. 153] PARTY TO THE CONTRACT EXHIBIT 1

Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, MYSLIWIEC; First Name, FREDERICK.

Home Address, 1413 Britton St., Wantach, N. Y.

Shop, Reliance Fuel Corp.

Address, 500 Hicksville, Rd.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Frederick Mysliwiec, Signature.

(Union Label) 357.

Date 3-2-60.

——, ——.

[fol. 154] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Weaver; First Name Merrill.

Home Address, 624 Grand Blvd., Deer Park, N. Y.

Shop, Reliance Fuel Oil.

Address, Massapequa, N. Y., 500 Hicksville, Rd.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designated this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and becomes due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Merrill T. Weaver, Signature.

(Union Label) 357.

Date 2/19/60.

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[fol. 155] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, McGarry; First Name, John.

Home Address, 765 Jackson Ave.

Shop, Reliance.

Address, Massapequa.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

John R. McGarry, Jr., Signature.

(Union Label) 357.

Date Feb- 18, 1960. ——, ——.

[fol. 156] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Cumber; First Name, Ralph.

Home Address, 2617 Riverside Ave., Seaford.

Shop, Reliance Fuel Oil Corp.

Address, Massapequa.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Ralph R. Cumber, Signature.

(Union Label) 357.

Date Feb 17 60.

——, ——.

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[fol. 157] **Amalgamated Local Union 355**

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Granger; First Name, Richard.

Home Address, 49 Reilly St., West Islip.

Shop, Reliance Fuel.

Address, 500 Hicksville Rd.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Richard Granger, Signature.

(Union Label) 357.

Date 2/17/60.

——, ——.

[fol. 158] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Cotgreave; First Name, William.

Home Address, 157 Scooter Lane, Hicksville.

Shop, Reliance.

Address, 500 Hicksville Rd.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

William Cotgreave, Signature.

(Union Label) 357.

Date 2/16/60.

——, ——.

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[fol. 159] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, ~~Salvatore J~~ Seddio; First Name, Salvatore J.

Home Address, 268 Glen Cove Rd., Carle Place, N. Y.

Shop, —.

Address, —.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Salvatore J. Seddio, Signature.

(Union Label) 357.

Date 2/16/60 ——, ——.

[fol. 160] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Ackerman; First Name, Carl.

Home Address, 16 Cherry Street, Center Islip.

Shop, Reliance Fuel Oil Corp.

Address, 500 Hicksville Rd., Mass.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Carl Ackerman, Signature.

(Union Label) 357.

Date 2-16-60. ——, ——.

COPY BOUND CLOSE IN CENTER

[fol. 161] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Messina; First Name, Reo.

Home Address, 3409 Homestead Ave., Wantogh.

Shop, Reliance Fuel.

Address, Massapequa.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Reo Messina, Signature.

(Union Label) 357.

Date 2/16/60. ——, ——.

[fol. 162] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Kerlinger; First Name, Frederick.

Home Address, Park Lane, Massapequa Park.

Shop, Reliance Fuel Oil.

Address, 500 Hicksville Rd.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Frederick F. Kerlinger, Signature.

(Union Label) 357.

Date 2/17/59. ——, ——.

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[fol. 163] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Haff; First Name, Raymond.

Home Address, 332 N. 8th St., Lenden Herst, N. Y.

Shop, Reliance Fuel Oil Corp.

Address, ~~Hick~~ Massapequa.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Raymond E. Haff, Signature.

(Union Label) 357.

Date 2-17-60. ——, ——.

[fol. 164] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Johnson; First Name, Frederick.

Home Address, 15 Rose Avenue, Roosevelt.

Shop, Reliance Fuel Oil Corp.

Address, 500 Hicksville Rd., Mass.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Frederick R. Johnson, Signature.

(Union Label) 357.

Date 2/17/60. ——, ——.

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[fol. 165] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Mott; First Name, Richard T.

Home Address, 586 Central Ave., Massapequa, N. Y.

Shop, Reliance Oil Corp.

Address, Massapequa, N. Y.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Richard T. Mott, Signature.

(Union Label) 357.

Date 2-18-60. ——, ——.

[fol. 166] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, JE Sammis; First Name, Ted-Charles.

Home Address, 5 Rosewood Pl., Bay Shore.

Shop, Reliance.

Address, New York, N. Y.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Ted-Charles Sammis, Jr., Signature.

(Union Label) 357.

Date 3/2/60. ——, ——.

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[fol. 167] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Kershow; First Name, R. Donald.

Home Address, 18 President St., Freeport.

Shop, Reliance.

Address, 500 Hicksville Rd., Mass.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Donald R. Kershow, Signature.

(Union Label) 357

Date— ——, ——.

[fol. 168] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Mendolia; First Name, Joseph.

Home Address, 723 Hyman Ave., Walslip.

Shop, Reliance.

Address, 500 Hickville Rd.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Joseph Mendolia, Signature.

(Union Label) 357.

Date 2/16/60. ——, ——.

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[fol. 169] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Graziano; First Name, Blaise.

Home Address, 3 Saddle Lane, S. Huntington.

Shop, Reliance Fuel.

Address, 500 Hicksvill Rd., Mass.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Blaise Graziano, Signature.

(Union Label) 357.

Date Feb 16, 1960. ——, ——.

[fol. 170] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Mysliwiec; First Name, Henry.

Home Address, Hicksville Rd.

Shop, —.

Address, Massapequa.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Henry Mysliwiec, Signature.

(Union Label) 357.

Date Feb 17th 60. ——, ——.

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[fol. 171] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Mendolia; First Name, Benjamin.

Home Address, 719 Hyman Ave., Walslip.

Shop, Reliance Fuel.

Address, 500 Hicksville Rd.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Benjamin Mendolia, Signature.

(Union Label) 357.

Date Feb 16, 1960. ——, ——.

[fol. 172] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Kern; First Name, Leonard.

Home Address, One Ann Terrace, Massapequa.

Shop, Reliance Fuel.

Address, 500 Hicksville Rd.

I hereby apply for membership in "Amalgamated Local Union 355,"' and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Len Kern, Signature.

(Union Label) 357.

Date 2/16/60. ——, ——.

COPY BOUND CLOSE IN CENTER

[fol. 173] Amalgamated Local Union 355

74-09 37th Avenue, Jackson Heights 72, N. Y.

Telephone OL 1-3737-8-9

Last Name, Graziano; First Name, Vincent.

Home Address, 400 Atlantic Ave, Massapequa Park, N. Y.

Shop, Reliance Fuel Oil Corp.

Address, 500 Hicksville Rd., Massapequa, N. Y.

I hereby apply for membership in "Amalgamated Local Union 355," and authorize and designate this union to represent me for collective bargaining with my employer.

I hereby authorize and direct my employer to deduct from my wages and to pay over to Amalgamated Local Union 355, such amounts including dues and initiation fees (as my membership dues) in said Union as may be established by the Union and become due to it from me during the effective period of this authorization. This authorization may be revoked by me as of any anniversary date hereof by written notice signed by me. This authorization shall automatically renew itself unless written revocation is submitted.

Vincent Granziano, Signature.

(Union Label) 357.

Date 2-16-1960. ——, ——.

[fol. 174] BEFORE THE NATIONAL LABOR RELATIONS BOARD, SECOND REGION

Case Nos. 2-CA-7173, 2-CA-7280

RELIANCE FUEL OIL CORP., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, COAL, GASOLINE, FUEL OIL LOCAL 553, AND AMALGAMATED LOCAL UNION 355, Party to the Contract.

STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF APRIL 18 AND 19, 1960

745 Fifth Avenue,
New York, New York.

Met, pursuant to notice, at 9:50 o'clock a.m.

Before: Sydney S. Asher, Jr., Trial Examiner.

APPEARANCES:

Bertram T. Kupsinel, Esq., 745 Fifth Avenue, New York, N.Y., appearing on behalf of the General Counsel.

Samuel H. Borenkind, Esq., 135 Broadway, New York, N.Y., appearing on behalf of the Employer.

Cohen & Weiss, Esqs., By: Herbert A. Levy, Esq., 50 East 42nd Street, New York, N.Y., appearing on behalf of the Charging Party.

Alexander Eltman, Esq., 350 Fifth Avenue, New York, N.Y., appearing on behalf of the Party to the Contract.

* * * * * * *

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[fol. 175] BENJAMIN MENDOLIA, called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

Direct examination.

* * * * * * *

[fol. 176] By Mr. Levy:

Q. Prior to the election were you paid a bonus for gallons over five thousand delivered?

A. Sure thing.

Q. After the election were you paid that kind of a bonus?

A. Well, let's put it this way: In my case, I cover a pretty hard run, and I can't do too many gallons. I do maybe four thousand gallons and I can't make no bonus.

Q. Even if it was given, you mean, you wouldn't make anything?

A. Because I cover a different run. I cover a hard run.

[fol. 177] Q. What I am asking is this: While the bonus was in effect, that was before the election, did you ever receive any bonus for gallons over five thousand?

A. Sure.

Q. After the election, did you receive a bonus for gallons over five thousand?

A. I can't answer that, because it's hard on my run. I've got a different run. I can't make gallons.

Trial Examiner: First ask him if he had any instances where he delivered over five thousand gallons after the election, because if he hasn't, he can't answer the question.

By Mr. Levy:

Q. Would you know whether, since the election, you had any days on which you delivered over five thousand gallons?

A. No, sir. I could never do it.

Q. You said that before the election you did have some days on which you could do it?

A. When I first started, when Mr. Packman was breaking me in, I used to get Plainview, Massapequa, and I used

to do it; but since I cover Amityville, and all around, I can't do it.

• • • • • • •

[fol. 178] Trial Examiner: State your name and address.

The Witness: Harold Packman, 96 Phipps Lane, Plainview, Long Island.

Direct Examination.

• • • • • • •

[fol. 178a] Q. Physically, how do you get this oil from Gulf?

[fol. 179] By Mr. Kupsinel:

Q. Do you make any purchases of any items whatsoever directly from outside the State of New York?

A. None that I can recall.

Q. As to parts for trucks that you use in delivering this oil, do you make any purchases of parts directly from outside the State of New York?

A. Well, when we cannot get a part within the City of New York, and it is a must, we go—I know of one place in Jersey where we have to get a hub or a wheel for a truck. If we have to go there to get it, yes. And that is called the Truck Tour Corporation, or something like that.

Q. These purchases of parts, how much would you say, roughly, they totaled during 1959?

A. A couple of hundred dollars at the most.

• • • • • • •

[fol. 180] Cross-examination.

By Mr. Borenkind:

[fol. 181] Q. And after the trucks of the Reliance Fuel Oil Corporation are loaded, what do your men do with the products?

A. They either deliver it directly to the consumer, or to our tanks in Massapequa.

Q. And they are removed, are they not, to your tanks,

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and your tanks store the products in Massapequa, Long Island?

A. Yes.

Q. And at some future date is it not true you redraw those products from your tanks and they are delivered to your consumers?

A. That's right.

Q. Are any of your consumers located outside the State of New York?

A. None.

Q. Do you want us to understand that all of Reliance's customers or consumers are located within the State of New York?

A. That is correct.

* * * * * * *

Trial Examiner: Now, Mr. Packman, would you say the [fol. 182] operations of your company are wholesale or retail?

The Witness: Retail.

Trial Examiner: You sell only to home owners?

The Witness: That is correct.

Trial Examiner: There is no wholesale operation at all?

The Witness: None whatsoever.

* * * * * * *

[fol. 183] Redirect Examination.

By Mr. Levy:

Q. Mr. Packman, you said something in your testimony before about an exchange basis with other companies. Do you store oil for them, or something?

A. No, we don't.

Q. Would you explain what you meant by "exchange"?

A. Well, we go to another terminal which is operated by somebody else. They, in turn, send their customers into our place on an exchange. Whatever we take out of the other terminal, we reimburse them what we owe them in our [fol. 184] terminal, and vice versa.

Q. Is this transaction ever handled by means of cash, or is it always handled by means of barter of oil?

A. It is barter of oil.

Q. You never make cash payments in payment for these exchanges?

A. There is only one instance that happened, and that was to our benefit of a price benefit, so we bought it instead of held on to exchange it.

Q. Did you ever sell any oil to any other oil companies?

A. None.

* * * * * * *

[fol. 185] Trial Examiner: What is the average size of a tank of the customers?

The Witness: Well, most of them are 275-gallon tanks.

Trial Examiner: What is the average size of a delivery? Two hundred gallons?

The Witness: No, no. We run them down 150 and 160 during the middle of the winter. I try to keep it in that category.

Trial Examiner: How often do you bill your customers?

The Witness: That depends on the degree days.

Trial Examiner: Do you bill them every time you make a delivery?

[fol. 186] The Witness: Do I bill them?

Trial Examiner: I say, how often do you bill the customers?

The Witness: The delivery ticket is their bill.

Trial Examiner: You don't send them any statement at the end of the month?

The Witness: Only those that require them.

Trial Examiner: When they receive a delivery ticket, they are supposed to send in a check for that amount; is that it?

The Witness: If their credit is not good. The driver fills in a complete charge of the delivery.

Trial Examiner: But he doesn't collect any money?

The Witness: Not unless the people want to pay.

Trial Examiner: In case they don't pay him, how often are they billed? If they have had two deliveries in a month, do you bill them after each delivery or do you bill them at the end of the month?

The Witness: They are not billed by our office. They are billed by the driver. And if they become a delinquent

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account, that we consider delinquent, we send them a notice that they are going to be up for delivery.

• • • • • • •

[fol. 187] Trial Examiner: Does each driver have a separate geographic area?

The Witness: Yes, they are more or less designated, unless we get into the slower period and we have men who just drive and they know the areas more so and those that remain.

• • • • • • •

[fol. 188] RICHARD GRANGER, was recalled as a witness for and on behalf of the General Counsel in rebuttal, and, having been previously duly sworn, was examined and testified further as follows:

• • • • • • •

Direct examination.

• • • • • • •

[fol. 189] By Mr. Kupsinel:

Q. Now, Mr. Granger, in the course of your duties as a serviceman, do you also make emergency deliveries of fuel oil?

A. That's right.

Q. Would you state on the average how many such emergency deliveries of fuel oil you make during the course of a week?

A. Well, to begin with, servicemen usually make emergency deliveries night work when the oil trucks are not on the road, and I would say that one night man would make on the average of between two and three dry tanks a night.

Q. How much fuel oil do you deliver at such times?

[fol. 190] A. Usually, ten gallons to a customer.

Trial Examiner: Excuse me just a moment.

Is the purpose of that just to give him enough so he can run through a day until a regular delivery is made?

The Witness: It is just enough to carry him overnight until a truck can get there the following day.

Trial Examiner: It is for emergency purposes?

The Witness: To give the people enough heat, so they won't be out of heat.

• • • • • • •

[fol. 191] By Mr. Levy:

Q. Mr. Granger, do you know how many trailer trucks Reliance Fuel Oil Corporation owns?

Trial Examiner: During what period?

Mr. Levy: During the month of January.

By Mr. Levy:

Q. Do you know how many trailer trucks Reliance Fuel Oil Corporation used in its business during the month of January?

A. I would say they have four trailer trucks.

[fol. 192] Q. As opposed to other kinds of trucks that are not trailer trucks; is that right?

A. Yes, sir.

Q. How many different trailer trucks are there?

A. They have transport trucks, and a house delivery trailer.

Q. Two different types of trailer trucks?

A. Two different trailers, yes.

Trial Examiner: I think what is confusing there is when you say variety, the trailer is a rig; it consists of two separate parts, as I understand it: the tractor, which is the motor; and the trailer, which is not the motor. It might be varieties of one and not the other, and vice versa. That is what is confusing to me.

Can you straighten that out?

By Mr. Levy:

Q. Well, you just said there was a transport and then there were smaller trucks. Of the transport type trucks you were speaking about, how many are there? Let's see if we can get at it this way.

A. I believe there are two.

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Q. Of those two, are the tractors of them exactly alike, as far as you know?

A. The two transports, I believe they are alike. I would say so.

Q. Are the trailers attached to these tractors of the transports, are they exactly alike also, the two trailers?

[fol. 193] A. Yes.

Q. The other kind of truck, what did you call that?

A. The house delivery truck, I suppose.

Q. Is that a smaller trailer?

A. That would be a smaller trailer than the transport.

Q. There are two of those, also?

A. I believe there are two.

Q. Of the house delivery trucks, the trailers are exactly alike, as far as you know?

A. I think one is a little bigger than the other.

Q. And the tractors, as far as you know, are they exactly alike?

A. I would say they are pretty nearly alike. I think they are different makes.

* * * * * * *

[fol. 194] Q. As I understand it, Mr. Granger, you were employed as a serviceman by Reliance?

A. Yes.

Q. Will you explain to the Hearing Officer the manner of your operations as a serviceman? You don't go out indiscriminately on service calls, do you?

A. No.

Q. You get your requests to go out on certain service calls, do you not?

A. Well, sometimes we have three or four calls and we [fol. 195] route them out usually the way they want to do them.

Q. Who gives you these calls?

A. The serviceman, usually.

Q. While you are on the road taking care of these service calls, isn't it also possible you will receive a request to attend to an emergency call?

A. Yes. In between sometimes, if there is an emergency, they try to get us on the radio.

Q. They try to get you on what?

A. The radio. The car is equipped with a radio.
Q. The car is equipped with a radio?
A. Yes.
Q. And that has contact with the Reliance plant; isn't that so?
A. That's right.
Q. And you may get a request over the radio to call at a particular point where there is an emergency call?
A. Yes.
Q. And that emergency call may or may not be that the customer ran out of fuel oil; isn't that so?
A. Yes, sir.
Q. Now, you did testify, did you not, that since the election and up to and including February 15th, 1960, you averaged about two dry runs each and every night; is that correct?
[fol. 196] A. On the average.
Q. On the average?
A. I never marked down the dates or the time.
Q. Just an average?
A. I would say an average, yes.

• • • • • • •

[fol. 197] By Mr. Eltman:

Q. If you were to report tonight, would you have any way of knowing right now how many dry runs you are going to have to work on tonight?
A. No.

Trial Examiner: Now, do you want to explain that answer?
The Witness: Except, as an average, the service department, each time they work at night, the men usually have to go out on two or three dry tanks a night.
Trial Examiner: In other words, you know the general average.
The Witness: Yes.

• • • • • • •

[fol. 198] Q. Mr. Granger, how long have you been employed by Reliance?
A. Almost a year.

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Q. And do you know how many retail customers Reliance has?

A. Not exactly. I would say in the neighborhood of eight thousand. That would be a guess. I don't have proof. I don't know.

Q. They have in the neighborhood of eight thousand customers and I understood you to testify that you have had on the average of two dry runs per night per week; is that correct?

A. On an average, I would say.

Trial Examiner: Per night, not per week.

Mr. Borenkind: Per night of each week, I should say.

The Witness: When I would work the night shift, and then somebody else would work the night shift.

By Mr. Borenkind:

Q. In your particular case, when you worked the night shift, on the average of two dry runs per night, that would run about twelve per week?

A. That's right.

Q. That would be about mathematically correct, wouldn't it?

A. Yes.

* * * * * * *

[fol. 199] By Mr. Borenkind:

Q. How many average calls did you make during a night shift as a serviceman?

A. It might vary between eight, nine, ten. There was no set, really, amount. I would say it averaged out maybe eight calls a night.

Q. And you want us to understand that out of those eight calls per night during the night shift, two were on dry runs?

A. Yes, sir.

* * * * * * *

[fol. 200] In United States Court of Appeals for the Second Circuit

National Labor Relations Board, Petitioner,

vs.

Reliance Fuel Oil Corp., Respondent

Answer of Respondent Reliance Fuel Oil Corp.—Filed April 3, 1961

To the Honorable, the Judges of the United States Court of Appeals for the Second Circuit.

First Defense

Denies each and every allegation contained in the petition herein, except that admits that respondent is a corporation, duly created, organized and existing under and by virtue of the laws of the State of New York and is engaged in business within the said State of New York.

Second Defense

The respondent was and still is engaged in business solely within the State of New York, and since such business does not affect interstate commerce, the National Labor Relations Board was and still is without jurisdiction over the pending controversy.

Third Defense

Notwithstanding certification proceedings there pending before the National Labor Relations Board, the employer, the respondent herein, had to and did bargain with a union of its employees' choice, which union was one other than the union certified by the National Labor Relations Board. That at all times mentioned in the petition, pleadings and proceedings heretofore had the respondent bargained with the union of its employees' choice, which said union is one other than the union certified by the National Labor Relations Board, and which collective bargaining agreement is still in full force and effect.

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[fol. 201] Fourth Defense

The respondent was not guilty of any unfair labor practice or any coercive tactics as charged by the National Labor Relations Board.

Wherefore, respondent respectfully prays that the petition herein be dismissed together with such other and further relief as to this Court may be proper in the premises.

/s/ Samuel H. Borenkind, Attorney for Respondent, Office & P.O. Address, 135 Broadway, New York City 6, New York.

Dated: New York City, March 30, 1961.

[fol. 202] Certificate of Service (omitted in printing)

[fol. 203] [File Endorsement Omitted]

[fol. 204] In United States Court of Appeals for the Second Circuit

No. 15—September Term, 1961

(Argued September 29, 1961 Decided November 13, 1961.)

Docket No. 26806

National Labor Relations Board, Petitioner,

v.

Reliance Fuel Oil Corporation, Respondent.

Before: Lumbard, *Chief Judge*, and Friendly and Smith, *Circuit Judges*.

On petition for enforcement of an order of the National Labor Relations Board, 129 NLRB No. 141. Enforcement denied. Remanded to the Board for further hearings and additional findings on the basis of the Board's jurisdiction.

Melvin Pollack, Attorney, National Labor Relations Board (Stuart Rothman, General Counsel, Dominick L.

Manoli, Asso. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Solomon I. Hirsh, Attorney, National Labor Relations Board, on the brief), *for petitioner.*

[fol. 205] Samuel H. Borenkind, New York, N. Y., *for respondent.*

Opinion—

Smith, *Circuit Judge:*

This is a petition of the National Labor Relation Board, pursuant to Section 10(e) of the amended National Labor Relations Act, 29 U. S. C. A. 160(e), for enforcement of a Board order issued against respondent January 5, 1961 reported at 129 NLRB No. 141. Since the alleged unfair practices occurred in Massapequa, Long Island, New York, within this judicial circuit, this court has jurisdiction over the petition for enforcement under Section 10(e). Enforcement denied. Remanded for taking of further evidence and making of additional findings.

Respondent is engaged in the sale of fuel oil for heating purposes and in servicing oil burners and boilers. All of its customers are home owners located in the State of New York. During the calendar year 1959 the respondent purchased from Gulf Oil, which is concededly engaged "in commerce," fuel oil and related products valued at more than $650,000. The largest part of the product sold to respondent is refined outside the State of New York and delivered into Gulf's storage tanks in New York, from where it is shipped to Gulf's stationary storage tanks at Oceanside, Long Island without segregation according to customers. Respondent's trucks withdraw the oil from the Oceanside tanks and deliver it directly to customers.[1]

The respondent employs two principal groups of workers: oil burners service employees numbering approximately 10, and fuel oil drivers numbering approximately 11. [fol. 206] On September 28, 1959, Local 553 of the Inter-

[1] The Board also found that respondent draws a certain amount of oil from other firms' tanks on a barter basis and that a portion of its purchases of truck parts is made outside of New York State which totals "a couple of hundred dollars at the most." As the Board did not rest its jurisdiction on these factors they will not be considered by the court.

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national Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed a petition with the Board in Case No. 2-RC-10280, seeking to represent a unit of respondent's servicemen which was later changed to include drivers as well. Previously, in the summer of 1958, Local 355 of the Retail, Wholesale and Department Store Union, AFL-CIO, had unsuccessfully attempted to organize the employees of respondent. Pursuant to the representation petition an election was held; Local 553 received 10 votes, Local 355 received 6 votes, one vote was cast for neither union and four votes were challenged.

Immediately after the election a so-called "shape-up" system was instituted carrying out a threat to institute such a system if Local 553 won the election and the extra-gallonage bonus previously paid drivers was discontinued. On February 14, 1960, Union President Flatow sent a letter to Packman, an officer of the respondent, stating that Local 355 represented a majority of the employees and demanding contract negotiations. The following day a meeting was held and after a cursory examination of the signatures on membership cards held by Local 355 a contract was entered into, immediately following which the "shape-up" system was discontinued and the drivers reimbursed for wages lost. Thereafter the respondent withheld $140.00 in dues from employees' wages and remitted this sum to Local 355 during the period February 23 to April 5, 1960. The Board certified Local 553 on March 15, 1960, as the exclusive representative of respondent's employees pursuant to the findings of the Regional Director overruling the challenges to two of the challenged votes. Asserting that the employees had chosen another union, with whom a contract had been signed, respondent refused to bargain collectively with Local 553.

[fol. 207] The Board concluded that by its threats, promises, and changes in working conditions for the purpose of influencing the choice of a collective bargaining agent respondent violated Section 8(a)(1) of the Act. 29 U. S. C. §158(a)(1); and that by recognizing and entering into a collective bargaining agreement with Local 355 respondent violated Section 8(a)(2) and (1) of the Act, 29 U. S. C. §158(a)(2) and (1), by rendering unlawful assistance. Moreover respondent's agreement to, and enforcement of, a contract provision which required membership in the un-

lawfully assisted union as a condition of employment violated Section 8(a)(3), (2) and (1) of the Act, 29 U. S. C. §158(a)(3), (2) and (1). Finally, the Board concluded that respondent was guilty of a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act, 29 U. S. C. §158(a)(5) and (1).

The Board ordered respondent to cease and desist from the unfair labor practices found and from interfering, in any other manner, with the rights of employees guaranteed by Section 7 of the Act, 29 U. S. C. §157. The Board also ordered respondent to withhold recognition from Local 355 and to cease giving effect to the bargaining agreement with it, unless and until that union is certified by the Board; to reimburse its employees for the dues checked off; and upon request to bargain collectively with Local 553.

Respondent resists enforcement on two grounds: (1) the Board failed to show any evidence of coercion; and (2) the Board was without jurisdiction of the subject matter since there was no showing of an effect upon commerce.

Granger, one of respondent's servicemen, testified that Packman, respondent's secretary and treasurer, pursued a course of conduct which was calculated to coerce the employees to reject Local 553 in favor of Local 355. Respondent attempts to meet this testimony by arguing that Granger was biased and inconsistencies in his testimony show he [fol. 208] was unworthy of belief. But this is a question of credibility as to which the Board is normally the sole judge.[2] Moreover, Granger's testimony is corroborated by that of Benjamin Mendolia,[3] Kershow,[4] Graziano,[5] Sammis,[6] and Joseph Mendolia.[7]

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[2] E.g., *NLRB* v. *Morris Fishman & Sons, Inc.*, 278 F. 2d 792 (3 Cir. 1960); *NLRB* v. *Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, Local 810*, 274 F. 2d 688 (2 Cir. 1960); *Paramount Cap Mfg. Co.* v. *NLRB*, 260 F. 2d 109 (8 Cir. 1958).

[3] Stenographic Transcript of Testimony, 113.

[4] *Id.* at 81-3.

[5] *Id.* at 137.

[6] The witness stated that Packman told him that "You see what's happened to the drivers, and you men haven't been hurt as yet." *Id.* at 55.

[7] 146-8.

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The findings on the merits are adequate and adequately supported by substantial evidence. Reimbursement is appropriate under these circumstances. The Board's order, including the provision for reimbursement, must therefore be enforced if the Board had jurisdiction over the dispute.[8]

The Board appears to assume that any employer, whose business exceeds the Board's "jurisdictional" minimum of $500,000, who purchases materials from storage within the state the origin of which is without the state, if involved in a labor dispute necessarily affects commerce within the meaning of the Act.

[fol. 209] The findings of the Board on effect on commerce here, perhaps because of reliance on *NLRB* v. *Pease Oil Co.*, 279 F. 2d 135 (2 Cir. 1960), are quite meager consisting of the following:

> "The respondent is a New York corporation, with its principal office and place of business in Massapequa, Long Island, New York. It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers. All its customers are homeowners located in the State of New York. During the fiscal year ending June 30, 1959, the Respondent's gross sales exceeded $500,000. During the calendar year 1959 the Respondent purchased from Gulf Oil Corporation, herein called Gulf, fuel oil and related products valued at more than $500,000. Most of the product delivered to the Respondent is refined outside the State of New York and delivered into Gulf's storage tanks at New York, New York. It is then transferred to Gulf's stationary storage tanks at Oceanside, Long

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[8] Since the Board's finding of coercion in the selection of a representative is amply supported by the evidence it is unnecessary to discuss respondent's contention that it was required to bargain with Local 355 which was found to be an employer-assisted union. *NLRB* v. *Revere Metal Art Co.*, 280 F. 2d 96, 99-100 (2 Cir. 1960). Even if the employees underwent a genuine change of attitude based upon a self-induced reappraisal they would be unable to repudiate informally the outcome of the election, at least after certification, for a reasonable period. *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954).

Island, New York, without segregation according to customers. The Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to the Respondent's customers, or to the Respondent's tanks at Massapequa, from which it is later withdrawn and delivered to customers. The Respondent also obtains some fuel oil by exchange with other fuel oil companies on Long Island. This operates as follows: The Respondent draws a certain amount of oil from the other firm's tanks; conversely the other firm draws the same amount of oil from the Respondent's tanks. It is a barter operation, without the payment of money. The Respondent has on occasions obtained truck parts directly from outside the State of New York. In 1959, these purchases totaled 'a couple [fol. 210] of hundred dollars at the most.' Other than this, the Respondent made no purchases of any kind directly from outside the State.

"Gulf is engaged in the nonretail and retail sale of fuel oils and related products. It operates in New York and in other States. Its gross sales and operating revenues in 1959, including consumer excise taxes, amounted to in excess of $3,170,000,000. The Respondent and the Party to the Contract concede, and I find that at all material times Gulf was engaged in commerce within the meaning of Section 2(6) and (7) of the Act."

These findings are based on this statement by the Law Department of Gulf:

"Gulf Oil Corporation is engaged in non-retail and retail business; sales and other operating revenues (including consumer excise taxes) for 1959 according to Annual Report amounted to $3,170,847,000.

Question No. 1: What was the gross amount of sales of all items sold to Reliance Fuel Oil Corp. during a twelve-month period?

Answer: For the year 1959: $669,805.

Question No. 2: Were most of the products sold by Gulf Oil Corp. to Reliance received by Reliance from sources outside the State of New York?

Answer: At present time, most of product delivered

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to Reliance is refined outside state and delivered into Gulf's terminal storage within state (New York City); redelivered into local Gulf storage on Long Island (not segregated for this customer); again redelivered to customer at or from Gulf's local Long Island storage."

The Supreme Court, however, seems never to have gone so far as to hold that mere size of a local business or [fol. 211] amount of its purchases within the state of materials the origin of which was outside the state, without relation to other factors necessarily brings it within the Act. In *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197 (1938) the Court declined to place its holding on the purchases of oil, coal, etc., although very large, which came from without the state.

"[W]hether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise."

Black, *J.,* concurring in *Polish Alliance* v. *Labor Board,* 322 U.S. 643, 652 (1944):

"The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U.S. 342; *Second Employers' Liability Cases,* 223 U.S. 1, 46-47; and see *Wickard* v. *Filburn,* 317 U.S. 111, 121. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation. *City of Yonkers* v. *United States,* 320 U.S. 685, and cases therein cited. It has insisted upon 'suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the

exercise of the federal power must clearly appear.' [fol. 212] *Id.; Florida* v. *United States*, 282 U.S. 194, 211-212; cf. *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 196-197; *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 92-95."

The Supreme Court has stated that the Congress used the full extent of its power under the commerce clause in this legislation. *Polish Alliance* v. *Labor Board, supra*, 647. The Court has never, however, held that local regulation of labor relations in local commerce was completely superseded. At the time of enactment of the Wagner Act the Congress was not sure of the limits of its power. Since the courts had defined commerce quite broadly in the interests of employers affected by strikes of miners and stone cutters, it was felt that regulation of labor relations could be upheld in industries affecting commerce on the same basis.[9] The limits of the concept "affecting commerce" having since been defined by the Supreme Court on a case by case basis in a number of instances.[10] The federal field, in the process of definition has appear to be steadily expanding. See Cox, Federalism in the Law of Labor Relations, 1954, 67 Harvard Law Review 1297. It may be that eventually the Congress will attempt more specifically to define the limits. As yet we cannot be certain of the extent of the exercise of federal power, but [fol. 213] must take each case as it comes up and fit it into the framework so far constructed.

On this question the Board relies on two cases in this

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[9] 79 Cong. Rec. 9682 (Rep. Connery), 74th Cong., 1st Sess. (1935).

> "The Supreme Court has said again and again, in the Coronado case and in the Stonecutters case that anything that affects interstate commerce, as far as a labor dispute is concerned, which burdens or obstructs interstate commerce, can be regulated under the commerce clause of the Constitution."

[10] E.g., *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937); *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Howell Chevrolet* v. *NLRB, infra; Polish Alliance* v. *Labor Board, supra.*

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circuit, *NLRB* v. *Van Deusen*, 138 F. 2d 893, 895 (2 Cir. 1943), *NLRB* v. *Pease Oil Co.*, *supra*, and on *NLRB* v. *Townsend*, 185 F. 2d 378 (9 Cir. 1950). None of these furnish very reliable support to the Board. In *Van Deusen* there was business in interstate commerce involved, or alternatively an effect on commerce by diversion of goods from interstate to intrastate business to replace production halted by the dispute. In *Pease Oil* the point as to affecting commerce was not considered. *Townsend*, an automobile retailer case, does use broad language supporting the Board's claim here. The Supreme Court, however, in *Howell Chevrolet Co.* v. *NLRB*, 346 U.S. 482 (1953), in affirming another 9th Circuit case which had cited *Townsend*, *NLRB* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (9 Cir. 1953), relied almost wholly on the interdependence of Howell's local and General Motors' national activities due to the detailed supervision permitted by the agency agreement.

It may be that today the Court would answer in the affirmative the question it left pending in *Consolidated Edison*. In view of the caution expressed in *Howell*, and in the concurring opinion in *Polish Alliance*, however, we may be sure that a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue. We cannot tell from the meager record before us anything about the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Reliance's proportion of Gulf's commerce in the relevant market, or the number and avail-[fol. 214] ability of alternate distributors to Gulf and to Reliance's customers.[11] While volume of commerce affected is not in itself material, such factual findings might well throw light upon the manner in which a stoppage at Reliance would affect commerce, if at all. We therefore

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[11] While we are aware that alternative sources of supply do not necessarily negate a finding of jurisdiction, *Labor Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 326 (1940), it seems essential that the court be enlightened as to the factual relationships involved.

decline to enforce the order at this time upon the record before us. Compare *NLRB* v. *MidCo Gasoline Co.*, 172 F. 2d 974 (5 Cir. 1949), *Stauffer* v. *Exley*, 184 F. 2d 962, 967-68 (9 Cir. 1950). The case is remanded to the Board with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce.

[fol. 215] In United States Court of Appeals, Second Circuit

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

National Labor Relations Board, Petitioner,

v.

Reliance Fuel Oil Corporation, Respondent.

Judgment—November 13, 1961

Petition for enforcement from the National Labor Relations Board.

This cause came to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said enforcement be and it hereby is denied and that the action be and it hereby is remanded to the National Labor Relations Board with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce, in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 216] [File endorsement omitted.]

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[fol. 217] IN THE UNITED STATES COURT OF APPEALS, FOR SECOND CIRCUIT

No. 26,806

[Title omitted]

MOTION BY THE NATIONAL LABOR RELATIONS BOARD FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR REHEARING—Filed November 28, 1961

To the Honorable, the Judges of the United States Court of Appeals for the Fourth Circuit:

Comes now the National Labor Relations Board, petitioner herein, by its Assistant General Counsel, and respectfully moves the Court that it grant the Board a 2-week extension of time in which to file a petition for rehearing. In support of this motion, the Board shows that:

1. The decision herein was entered on November 13, 1961, and received by the Board on November 15, 1961.
2. Under Rule 25 of this Court, the Board's petition for rehearing would be due no later than November 28, 1961.
3. Because of the Thanksgiving holiday and the press of other litigation in which the Board's attorneys are engaged, the Board will be unable to file its printed petition for rehearing within the time prescribed by Rule 25.

Wherefore, the Board prays that it be given until December 12, 1961, to file a petition for rehearing in this case.

/s/ Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D.C., this 24th day of November, 1961.

[fol. 218] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 219] ALLOWANCE OF MOTION FOR LEAVE TO EXTEND TIME TO FILE PETITION FOR REHEARING—Nov. 28, 1961

The motion is granted.

J.E.L., H.J.F., J.J.S., U.S.C.JJ.

[File endorsement omitted.]

[fol. 220] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO EXTEND TIME TO FILE PETITION FOR REHEARING—November 28, 1961

A motion having been made herein by counsel for the petitioner to extend the time to file a petition for rehearing, until December 12, 1961,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

A. Daniel Fusaro, Clerk.

[fol. 221] [File endorsement omitted.]

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[fol. 222] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge.

[Title omitted]

ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING—December 13, 1961

It is hereby ordered that leave to file a petition for rehearing today be and it hereby is granted.

A. Daniel Fusaro, Clerk.

[fol. 223] [File endorsement omitted.]

[fol. 224] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 26806

[Title omitted]

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING—Filed December 13, 1961

[File endorsement omitted.]

[fol. 225] [Title omitted]

The National Labor Relations Board respectfully petitions the Court to grant rehearing with respect to its decision of November 13, 1961 herein, insofar as it remands the case "to the Board with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce, if at all" (slip op. 117). We believe that the re-

mand reflects an erroneous view of the principles governing the determination of whether a business "affects commerce" within the meaning of Section 2 (6) and (7) of the Act—a view which is contrary to settled authority, and raises a serious problem in the administration of the Act. Since the Board, not anticipating that the decision would go off on jurisdictional grounds, did not fully brief that issue previously (see Board Brief, p. 2, n. 2), the Court [fol. 226] arrived at its decision without the benefit of a complete statement of the Board's position.

1. It is apparently the Court's view that a local business may not be found to "affect commerce" within the meaning of Section 2(6) and (7) of the National Labor Relations Act merely on a showing that it purchases substantial quantities of goods or supplies which come from out-of-state. Thus, the Court held that it is not enough for the Board to establish, as it did, that, during the calendar year 1959, respondent—which sells fuel oil to homeowners in New York—purchased more than $650,000 worth of fuel oil and related products from the Gulf Oil Corporation, a company concededly engaged in interstate commerce, which was stored "within the state [but] the origin of which [was] without the state" (slip op. 111). The Court requires that the Board show, in addition, "the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Reliance's proportion of Gulf's commerce in the relevant market, or the number and availability of alternate distributors to Gulf and to Reliance's customers" (slip op. 116-117, footnote omitted). With all due deference, we submit that the additional information sought by the Court is immaterial to a determination of the Board's jurisdiction in this case.

2. The applicable principles respecting the scope of the National Labor Relations Act, which have been devel- [fol. 227] oped in a long line of judicial decisions, may be summarized as follows:

(a) "The Act on its face * * * evidences the intention of Congress to exercise whatever power is constitutionally given it to regulate commerce * * *." *N.L.R.B.* v. *Fainblatt,* 306 U.S. 601, 607. See also, *Polish National*

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Alliance v. *N.L.R.B.*, 322 U.S. 643, 647. *Guss* v. *Utah Labor Board*, 353 U.S.

(b) The full sweep of Congress' power under the commerce clause—and hence of the Act's coverage—is not limited to operations which are "in commerce," but extends to local and intrastate activities which would have an impact on the free flow of commerce. The reach of the National Labor Relations Act is thus to be tested by determining whether interstate transportation or the flow of commerce across state lines would tend to be impeded if the business immediately involved were disrupted as a result of a labor dispute caused by unfair labor practices. If so, the Act applies, regardless of the volume of interstate commerce affected, provided it is more than *de minimis*. *N.L.R.B.* v. *Fainblatt*, 306 U.S. 601, 607; *Santa Cruz Co.* v. *N.L.R.B.*, 303 US 453, 467; *N.L.R.B.* v. *Bradford Dyeing Assoc.*, 310 U.S. 318, 326; *N.L.R.B.* v. *Denver Bldg. Council*, 341 U.S. 675, 684; *N.L.R.B.* v. *Suburban Lumber Co.*, 121 F. 2d 829, 832 (C.A. 3), certiorari denied, 314 U.S. 693.

(c) "Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for [fol. 228] judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance* v. *N.L.R.B.*, 322 U.S. 643, 648.

3. Under the foregoing principles, the Board's jurisdiction over respondent is established, without more, by the fact that, during the year preceding the unfair labor practices, it purchased in excess of $650,000 worth of fuel oil from Gulf, which the latter concededly obtained from out-of-state. For a shut down of respondent due to a labor dispute would cause it to discontinue purchasing this amount of oil from Gulf, and it is likely that this, in turn, would force Gulf to curtail, or at least delay, further shipments of oil into the state until it found other customers for the quantity normally taken by respondent, or additional storage facilities. Irrespective of what portion of

the total fuel oil market in New York respondent and Gulf satisfy and of the contract relations between the two companies, the potential obstruction to $650,000 worth of out-of-state oil shipments as a result of a labor dispute involving respondent is well above *de minimis* and thus provides a sufficient effect on commerce to bring respondent's business under the Act. And the impact on commerce is even more substantial when is added—as *Polish National Alliance, supra* permits—the danger that a labor dispute involving respondent may, if unchecked, spread to other fuel oil dealers in the area, thereby further "damming up" the flow of fuel oil shipments into the state.

[fol. 229] Nor is the foregoing altered by the possibility that, if respondent had but a small share of the fuel oil market, Gulf might be able, without much difficulty, to find other outlets for supplies otherwise purchased by respondent. The availability of substitute facilities is not a material factor in applying the Act's jurisdictional requirements. The mere imposition on an interstate company like Gulf of the burden of having to rearrange its normal business dealings and find new customers constitutes an interference with its operations. Moreover, the Act does not require that an *actual* effect on commerce be shown; a *presumed* effect is sufficient.[1] *N.L.R.B.* v. *Bradford Dyeing Ass'n.*, 310 U.S. 318, 326;[2] *N.L.R.B.* v. *Van DeKamp's Hol-*

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[1] Section 2(7) of the Act defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or *tending to lead* to a labor dispute burdening or obstructing commerce or the free flow of commerce." [Emphasis added.]

[2] In its decision, this Court cited *Bradford Dyeing* for the proposition that "alternative sources of supply *do not necessarily* negate a finding of jurisdiction" (sl. op. 117, n. 11, emphasis supplied). We submit that the Supreme Court, in holding that such factor was "not material," intended to rule it out altogether as a consideration, and this is the way *Bradford Dyeing* has consistently been interpreted by the courts of appeals. See, *N.L.R.B.* v. *El Dorado Water Co., Inc.*, 195 F. 2d 950, 952 (C.A. 8); *N.L.R.B.* v. *Davis Motors, Inc.*, 192 F. 2d 782, 782-783 (C.A. 10); *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 382 (C.A. 9), certio-

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[fol. 230] *land-Dutch Bakers,* 152 F. 2d 818, 819-820 (C.A. 9); *N.L.R.B.* v. *Phoenix Mutual Insurance Co.,* 167 F. 2d 983, 985 (C.A. 7), certiorari denied, 335 U.S. 845; *N.L.R.B.* v. *Register Publishing Co.,* 141 F. 2d 156, 162-163 (C.A. 9); *N.L.R.B.* v. *Tex-O-Kan Flour Mills, Inc.,* 122 F. 2d 433, 436-437 (C.A. 5).

Similarly, it makes no difference, for purposes of the Act, that respondent obtained its fuel oil from Gulf's storage tank in Oceanside, New York, rather than having it sent to it directly from outside the state, via railroad or ship. "The fact that the company, instead of itself buying all its supplies outside the state and shipping them in, • • • has some arrangement whereby someone else ships them in and then it buys them from the shipper after they come into the state, does not destroy the effect of the transactions on interstate commerce." *N.L.R.B.* v. *Sunshine Mining Co.,* 110 F. 2d 780, 784 (C.A. 9), certiorari denied, 312 U.S. 678. Accord: *N.L.R.B.* v. *Co-well Portland Cement Co.,* 148 F. 2d 237, 242 (C.A. 9), certiorari denied, 326 U.S. 735; *N.L.R.B.* v. *Edinburg Citrus Ass'n.,* 147 F. 2d 353, 354 (C.A. 5); *J. L. Brandeis & Sons* v. *N.L.R.B.,* 142 F. 2d 977, 980-981 (C.A. 8), certiorari denied, 323 U.S. 751; *N.L.R.B.* v. *Vulcan Forging Co.,* 188 F. 2d 927, 930 (C.A. 6).[3]

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rari denied, 341 U.S. 909; *N.L.R.B.* v. *Mid-Co Gasoline Co.,* 183 F. 2d 451, 452, 453, (C.A. 5); *J. L. Brandeis & Sons* v. *N.L.R.B.,* 142 F. 2d 977, 980 (C.A. 8), certiorari denied, 323 U.S. 751; *N.L.R.B.* v. *Bank of America,* 130 F. 2d 624, 626 (C.A. 9), certiorari denied, 318 U.S. 791, 792; *N.L.R.B.* v. *Western Mass. Elec. Co.,* 120 F. 2d 455, 457 (C.A. 1); *Pueblo Gas & Fuel Co.* v. *N.L.R.B.,* 118 F. 2d 304, 306 (C.A. 10); *Cudahy Packing Co.* v. *N.L.R.B.,* 118 F. 2d 295, 299 (C.A. 10); *N.L.R.B.* v. *Henry Levaur, Inc.,* 115 F. 2d 105, 109 (C.A. 1), certiorari denied, 312 U.S. 682; *Consumers Power Co.* v. *N.L.R.B.,* 113 F. 2d 38, 40-41 (C.A. 6).

[3] It is enough that the activity "exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' " *Wickard* v. *Filburn,* 317 U.S. 111, 125 (sustaining the application of the Agricultural Adjustment Act to a farmer raising, for his own consumption, 239 bushels of wheat in excess of his "marketing quota").

[fol. 231] See also, *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 237-238.

Finally, the potential impact of a labor dispute on Gulf's interstate commerce is not diminished by the fact that respondent sells its fuel oil to private dwellings exclusively, rather than to enterprises engaged in commerce. "The fact that the [fuel oil], after its [purchase by respondent], might be used only for local purposes does not alter the fact that its [purchase], as distinguished from its later use, affected interstate commerce." *N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 684. Were the constitutional principle otherwise, the Board would be without statutory jurisdiction over many businesses of a local nature, including service facilities, retail stores, and much of the building and construction industry. Yet, as more fully shown below, the courts have consistently held otherwise.

4. By application of the foregoing principles, the Board's jurisdiction has been sustained over a variety of local businesses, whose connection with and impact on interstate commerce were no more substantial than respondent's business. See *N.L.R.B.* v. *Denver Bldg. Council*, 341 U.S. 675, 683-684; *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, 22-23; *Amalgamated Association, etc.* v. *Wisconsin Board*, 340 U.S. 383, 391; *IBEW* v. *N.L.R.B.*, 181 F. 2d 34, 36-37 (C.A. 2), affirmed, 341 U.S. 694; *Shore* v. *Bldg. Trades* [fol. 232] *Council*, 173 F. 2d 678 (C.A. 3); *N.L.R.B.* v. *Herald Publishing Co.*, 239 F. 2d 410 (C.A. 9), and cases cited therein; *N.L.R.B.* v. *Mid-Co. Gasoline Co.*, 183 F. 2d 451 (C.A. 5):[4] *Joliet Contractors Ass'n* v. *N.L.R.B.*, 193 F.2d

[4] The irrelevancy of the market and other information sought by the court in its remand in this case is shown by the history of the *Mid-Co* case. The Fifth Circuit, with Judge Hutcheson dissenting, had first remanded that case to the Board for additional information similar to that sought here. 172 F. 2d 974. The Board accepted the remand and made the additional findings requested, pointing out, however, that, under the applicable principles, jurisdiction nonetheless existed. 86 NLRB 48. Thereupon, the Fifth Circuit, in an opinion by Judge Hutcheson, proceeded to enforce the Board's order without reference to the detailed supplemental findings. 183 F. 2d 451.

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833, 840-842 (C.A. 7); *N.L.R.B.* v. *Dixie Terminal Co.*, 210 F. 2d 538 (C.A. 6), certiorari denied, 347 U.S. 1015.

Thus, in the *Shore case, supra,* the Third Circuit sustained the Board's exercise of jurisdiction over a labor dispute which arose during the course of the construction of a drive-in theatre. The Court posed the jurisdictional question as follows (173 F. 2d at 680):

> It is to be noted that the customer was a Pennsylvania customer, the construction that of a local theater, and the general contractor and the sub-contractor here involved were Pennsylvania business concerns. How, then, does the Taft-Hartley Act have anything to do with the matter?

The Court then observed that, during the preceding year, some of the materials used by the contractor and sub-contractor, although purchased within the state, had "origi- [fol. 233] nated in states other than Pennsylvania" (*ibid.*), and that some of the supplies used in the project had been sent to the site directly from out-of-state. It also noted that the entire building industry, when considered on a nationwide basis, did an annual business of more than $10 billion. Answering the question put at the outset, the Court concluded (*id.*, at 681):

> All of this argument adds up to the conclusion that what affects the building industry in a given community affects interstate commerce and that the total effect of a $10,000,000,000 industry on interstate commerce is obviously very appreciable. One small stoppage may not have an immediately perceptible effect upon the flow of the whole stream. But many small stoppages will have such effect. And like the small amount of grain in *Wickard* v. *Filburn,* * * * the power to regulate is not lost because of the small size of any individual contribution. We reach the conclusion that it cannot be denied that Congress may, through its power to regulate what affects interstate commerce, regulate practices in industries which are themselves dependent on interstate commerce. That Congress has done so in the Act regulating labor relations is established. There is no escape, therefore, from the

answer that the power is there and Congress has chosen to exercise it. [Footnotes omitted.]

5. The cases relied on by the Court are not inconsistent with the foregoing. The fact (slip op. 114) that the Supreme Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, elected to sustain the exercise of jurisdiction in that case, not on Edison's purchases of supplies which came [fol. 234] from out-of-state, but on the basis of the concededly interstate business of its customers, does not suggest that the former factor would not be enough were it the only factor. The only inference which can properly be drawn from the Supreme Court's action is that, where other, more dramatic, evidence of a connection with interstate commerce was present, the Court found it unnecessary to rest the case on the "lesser" factors as well.[5] Indeed, in *Consolidated Edison* itself, the Court recognized that an effect on commerce may be established either by showing that the business immediately involved services or sells to interstate concerns, *or* obtains materials and supplies from out-of-state, for it stated "that it is the effect upon interstate or foreign commerce, not the source of the injury, which is the criterion" (305 U.S. at 222).[6] Moreover, in its subsequent decisions in *Polish National Alliance* and *Denver Bldg. Council, supra,* the Court has made it plain that

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[5] The same reasoning would apply to the Court's action in relying on the franchise arrangement in *Howell Chevrolet Co.* v. *N.L.R.B.*, 346 U.S. 482 (slip op. 116). Cf. *N.L.R.B.* v. *Denver Bldg. Council, supra,* where the Court upheld the Board's statutory jurisdiction on the grounds that "any widespread application of the practices here charged might well result in substantially decreasing the influx of materials into Colorado from outside the State and * * * that [the employer's] annual purchases of over $55,000 of such materials was not negligible" (341 U.S. at 683-684).

[6] As the Court stated in *United States* v. *Women's Sportswear Mfgrs.' Assn.*, 336 U.S. 460, 464, in discussing an analogous problem under the Sherman Act: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze."

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any effect on commerce, which is more than *de minimis*, is [fol. 235] sufficient to bring a business within the Board's legal jurisdiction, and that, in assessing that impact, it is also appropriate to take into account the fact that the dispute could spread to other similar businesses.[7]

Moreover, we believe that the Court unduly minimizes its holding in *N.L.R.B.* v. *Van Deusen*, 138 F. 2d 893, in distinguishing that case on the grounds that "there was business in interstate commerce involved, or alternatively an effect on commerce by diversion of goods from interstate to intrastate business to replace production halted by the dispute" (slip op. 116). There, as here, the interstate commerce involved was conducted by the employer's [fol. 236] supplier (Tiny Town), not by the employer

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[7] The Court relies (slip op. 114), not on the majority opinion in *Polish National Alliance*, which enumerates the broad test set forth above (pp. 3-4), but on the concurring opinion of Justice Black in that case. In any event, Justice Black, in the passage quoted, was merely criticizing the majority of the Court for affirming the Board's decision on grounds which the Board had not considered. The Board had found—and Justice Black agreed—that it had jurisdiction over the employer because the insurance company "was itself 'engaged in commerce.'" 322 U.S. at 651. The majority opinion, written by Justice Frankfurter, held that the Board had jurisdiction because the employer's "insurance activities merely affected commerce in types of interstate business other than its own." *Ibid.* The concurring opinion observed that "on this fact issue [the Board] made no finding at all." *Ibid.* By this, Justice Black must have meant only that the Board had not made the specific finding that the employer's business "affected interstate activities of other businesses (*id.*, at 653), for he agreed with the result "for the reasons given in the Court's opinions in this case and in *United States* v. *South-Eastern Underwriters' Association*, 322 U.S. 533," an anti-trust case which was decided the same day. Compare the majority opinion of Justice Black in *South-Eastern Underwriters'* with the dissenting opinions of Chief Justice Stone (322 U.S. at 562-583) and Justice Frankfurter (*id.*, at 583-584).

(Van Deusen) himself; and, as here, the transactions between the two parties took place entirely within one state.[8] Yet, the Court held that the Board properly asserted jurisdiction over Van Deusen's operation. It is especially significant that the Court emphasized that jurisdiction would exist, even on the assumption that all of the garment parts which Van Deusen processed for Tiny Town originated in, and thereafter remained within, the State of New York. For a "labor dispute limiting production in [Van Deusen's] plant would necessarily tend to curtail and disrupt Tiny Town's interstate shipments by compelling Tiny Town to divert dresses from its interstate to its intrastate business" (138 F. 2d at 895).

6. The consequences of the Court's holding transcend this particular case. The Board has, for years, been asserting jurisdiction over innumerable retail and service businesses where the only effect on commerce is the fact that they purchase substantial quantities of goods and supplies which come, directly or indirectly, from out-of-state. If the additional data required by the Court's remand is relevant to a determination of the jurisdictional question in this case, it would be relevant in untold numbers of similar cases as well. This would call for a drastic revision of the procedures which have heretofore been [fol. 237] utilized in the trial of jurisdictional issues and would impose a substantial additional administrative burden on Board processes.

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[8] That is, Tiny Town, a garment manufacturer in New York, furnished parts of garments to Van Deusen, a contractor also in New York. Van Deusen finished the parts, which were then returned to Tiny Town. Tiny Town sold most of the finished garments in other states, and most of the materials used in their fabrication were purchased out-of-state.

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Conclusion

For the foregoing reasons, the Board respectfully prays that the petition for rehearing be granted, and that, after such rehearing, a decree be entered enforcing the Board's order in full.

Stuart Rothman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Norton J. Come, Assistant General Counsel, Melvin Pollack, Solomon I. Hirsh, Attorneys, National Labor Relations Board.

December 1961.

Certificate of Counsel

Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, certifies that he has read and knows the contents of the foregoing petition and that said petition is filed in good faith and not for purposes of delay.

Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board.

December 11, 1961.

[fol. 238] In United States Court of Appeals for the Second Circuit

National Labor Relations Board, Petitioner,

v.

Reliance Fuel Oil Corporation, Respondent.

Opinion on Petition of N. L. R. B. for Rehearing—January 4, 1962

Petition for rehearing denied.

Section 2(7) of the National Labor Relations Act defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or hav-

ing led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Therefore, if the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had at one time moved in interstate commerce, it would have been easy enough to say so.

[fol. 239] The case of *Wickard* v. *Fillburn*, 317 U. S. 111 (1942), urged upon us by the Board's petition for rehearing is inapplicable here. In that case the Supreme Court was dealing with a statute which was clearly broad enough to apply to the defendant's activities, and the only question before the court was the constitutionality of that statute. In the case at bar, the constitutionality of regulating the defendant's labor dispute is clear, and we are faced with a question of statutory interpretation. In the resolution of this question, the findings called for in the opinion are required.

January 4, 1962.

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[fol. 240] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—January 4, 1962

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 241] [File endorsement omitted.]

[fol. 242] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 243] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 843

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

RELIANCE FUEL OIL CORPORATION

ORDER ALLOWING CERTIORARI—May 21, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinions of the court below (Appendix, *infra*, pp. 16–29) are reported at 297 F. 2d 94. The findings of fact, conclusions of law, and order of the Board (B.A. 4–52)[1] are reported at 129 NLRB 1166.

JURISDICTION

The judgment of the court of appeals remanding the case to the Board was entered on November 13, 1961 (Appendix, *infra*, pp. 26–27). The order of the court of appeals denying the Board's petition for re-

[1] "B.A." refers to the portion of the record printed as the Board's Appendix in the court below.

hearing was entered on January 4, 1962 (Appendix, *infra*, p. 29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the Board may properly conclude that the operations of an employer engaged in a wholly local business "affect commerce" within the meaning of the National Labor Relations Act by reason of the fact that he purchases, within the State, substantial quantities of supplies from a supplier who has imported them from outside the State.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 2. When used in this Act—
>
> * * * * *
>
> (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.
>
> (7) The term "affecting commerce" means in commerce, or burdening or obstructing com-

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merce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

STATEMENT

A. *The Board's Decision and Order.*—The Board found that respondent violated Sections 8(a) (1), (2), (3), and (5) of the Act by, *inter alia,* according exclusive recognition to Local 355[2] at a time when it was obligated to recognize Local 553,[3] refusing to bargain with Local 553, and restraining and coercing its employees to abandon Local 553 and join Local 355 (B.A. 4–5, 43–44, 24–29, 29–33, 35–36, 36–38, 40–42). The Board ordered respondent to cease and desist from the unfair labor practices found, and to take appropriate affirmative action to undo the effects of its illegal conduct (B.A. 5–9). The only question here relates to the propriety of the Board's conclusion that it had jurisdiction over respondent's operations. The underlying facts on which the Board based this conclusion are as follows:

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[2] Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL–CIO.

[3] Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-Burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Respondent Reliance is a New York corporation with its principal office and place of business in Massapequa, Long Island, New York (B.A. 12). It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers (B.A. 12–13). Its customers are homeowners located in the State of New York (B.A. 13). During the fiscal year ending June 30, 1959, respondent's gross sales exceeded $500,000 (B.A. 13). During the calendar year 1959, it purchased from the Gulf Oil Corporation fuel oil and related products valued at more than $650,000 (B.A. 13; 57, 135–136). Gulf Oil Corporation, which is engaged in the retail and non-retail sale of fuel and related products, operates in New York and other States, and is concededly engaged in interstate commerce (B.A. 13–14; 134, 135–136). Gulf's gross sales and operating revenues in 1959, including consumer excise taxes, exceeded $3,170,000,000 (B.A. 13–14; 136). Most of the products sold and delivered to Reliance by Gulf are refined by the latter outside New York State, delivered into Gulf's storage tanks at New York City, and then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, without segregation according to customers (*ibid.*). Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to Reliance's customers or to Reliance's tanks at Massapequa, from which it is later withdrawn and delivered to customers (B.A. 13).[4]

[4] The record also showed that in 1959, respondent purchased a few hundred dollars worth of truck parts in New Jersey (B.A. 13). In asserting jurisdiction, however, the Board did not rely on these transactions.

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On the basis of these facts, the Board found that respondent's operations affected interstate commerce within the meaning of the Act (B.A. 15), and further, that respondent's unfair labor practices "tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act" (B.A. 44).[5]

B. *The Decision of the Court of Appeals.*—The court below found that the Board's findings on the merits were "adequate and adequately supported by substantial evidence," and that the Board's order should be enforced in full "if the Board had jurisdiction over the dispute" (Appendix, *infra,* p. 20). However, the court held that the record did not adequately prove the existence of legal jurisdiction and remanded the case to the Board "to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce" (Appendix, *infra,* p. 26).

Noting that in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, and *Howell Chevrolet Co.* v. *National Labor Relations Board,* 346 U.S. 482, the jurisdictional determination was not predicated on the fact that there were substantial intrastate purchases which originated outside the State, the court below indicated that that factor alone would not be sufficient to permit Congress to regulate

[5] The Board also found that, since respondent's gross sales were in excess of $500,000 per year, its operations satisfied the Board's discretionary standards for the exercise of its legal jurisdiction (B.A. 14–15).

a local business (Appendix, *infra,* pp. 23–25). Accordingly, it concluded that "a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue" (Appendix, *infra,* p. 25). The court remanded the case so that the Board would ascertain various facts tending to show that a work stoppage would in fact impede the flow of commerce into the State.

The Board filed a petition for rehearing, which petition was denied in a supplemental opinion (Appendix, *infra,* pp. 27–28). The court of appeals there held that it was "clear" that Congress could constitutionally regulate the labor dispute here, and that the problem presented was only one of statutory interpretation. Interpreting the definition of "affecting commerce" in Section 2(7) of the Act, the court again concluded that the Board had jurisdiction over employers not themselves engaged in interstate commerce only if the labor dispute actually hindered or obstructed interstate commerce; the mere purchase of substantial amounts of supplies which originated outside the State would not be sufficient.

REASONS FOR GRANTING THE WRIT

Section 10(a) of the National Labor Relations Act gives the Board power "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." The phrase "affecting commerce" is defined in Section 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free

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flow of commerce." The court of appeals below held in both its initial opinion and its opinion denying rehearing that the Act did not confer on the Board jurisdiction over labor disputes involving a local business whose impact on interstate commerce stemmed solely from the fact that it purchased substantial quantities of supplies which originated outside the State.

In the supplemental opinion, the court reasoned that the Act did not give the Board all the power which Congress could constitutionally confer under the commerce clause and therefore held (Appendix, *infra*, p. 28):

> * * * Congress intended the court to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly hinder or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had at one time moved in interstate commerce, it would have been easy enough to say so.

The original opinion, which apparently treated the jurisdiction of the Board under the Act and the constitutional power of Congress as coextensive, was somewhat less clear. It did, however, require the Board to show how "a work stoppage would affect commerce." Therefore, the court remanded the case to the Board to ascertain "the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Re-

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liance's proportion of Gulf's commerce in the relevant market, or the number and availability of alternate distributors to Gulf and to Reliance's customers" (Appendix, *infra,* pp. 25–26).

Thus, the court held that, in order to assume jurisdiction under the Act, the Board was required to prove that the labor dispute had an actual impact on commerce, and it ruled that the purchase of substantial supplies originating outside the State was not enough in itself to show such an impact. This holding should be reviewed by this Court because (1) it is erroneous and is inconsistent with controlling decisions of this Court and with decisions in courts of appeals; (2) it is inconsistent with the provisions of Section 14(c)(1) of the Act; and (3) it will seriously interfere with the efficient functioning of the Board.

1. *a.* The holding of the court below in its supplemental opinion denying rehearing is directly, on its face, inconsistent with decisions of this Court. The court of appeals admitted in its supplemental opinion that Congress clearly has the constitutional power to regulate the labor dispute involved in this case. Nevertheless, the court of appeals held that the Board was without jurisdiction since the jurisdiction conferred by the National Labor Relations Act on the Board is less than Congress' constitutional power over commerce. This Court has several times held to the contrary. *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, 3; *Polish National Alliance* v. *National Labor Relations Board,* 322 U.S. 643, 647; *National Labor Relations Board* v. *Fainblatt,* 306 U.S. 601, 606–607. As was said in the *Guss* case:

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> Since it was first enacted in 1935, the National Labor Relations Act has empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice * * * [defined by the Act] affecting commerce." By this language and by the definition of "affecting commerce" elsewhere in the Act, Congress meant to reach to the full extent of its power under the Commerce Clause. [Footnotes omitted.]

b. The court below held in its first opinion that Congress, and thus the Board, could not constitutionally regulate—and therefore in the Act did not regulate—a local business whose only impact on interstate commerce stemmed from the purchase of substantial quantities of supplies which originated outside the State. That view is likewise contrary to principles established by this Court. In *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 22–23, this Court described the jurisdictional facts as follows (*id.* at 22):

> Respondent operates three meat markets in the vicinity of Akron, Ohio. All of its sales are intrastate, but of its purchases in one year totaling not quite $900,000, slightly more than $100,000 worth came from outside Ohio directly and as much or more indirectly.

On the basis of these facts, this Court simply held that "[w]e do not agree that respondent's interstate purchases were so negligible that its business cannot be said to affect interstate commerce within the meaning of § 2(7) of the National Labor Relations Act" (*ibid.*).

The facts in *Fairlawn Meats* are extremely close to those in the instant case. Here, too, all of the Company's sales were intrastate but its purchases of supplies originated outside the State. Indeed, here, the Company's out-of-State purchases ($650,000) were considerably more in amount and in proportion to the Company's total purchases (almost 100 percent) than that of the employers in the *Fairlawn Meats* case. The only distinction between the two cases is the fact that some of the employer's purchases in *Fairlawn Meats* came directly from outside the State while here all were indirectly purchased in the sense that they were brought by Gulf Oil into the State and then sold within the State to the Company. But this Court did not consider this extremely formalistic and, we believe, irrelevant distinction to be important in holding that the Board had jurisdiction. We therefore submit that the situation in *Fairlawn Meats* case is in all essential respects identical to that involved here and that therefore that decision is fully controlling.[6] See also *National Labor Relations Board*

[6] This conclusion is not impaired by the fact, emphasized by the court below (Appendix, *infra*, pp. 23–25), that in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, and *Howell Chevrolet Co.* v. *National Labor Relations Board*, 346 U.S. 482, this Court rested its jurisdictional determination on factors other than the products and supplies which had come to the companies there involved across state lines. This merely shows that, since other more dramatic evidence of a connection with interstate commerce existed, the Court found it unnecessary to rest the case on this factor as well.

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v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 683–685.[7]

In addition, the holding below is inconsistent with the general principles repeatedly articulated by this Court to determine the reach of the Act. The court of appeals remanded the case to the Board for findings as to whether a labor dispute at the Company would in fact impede commerce. However, this Court has held that in order for the Board to have jurisdiction, it is not necessary to demonstrate an *actual* impact on commerce, but only the potentiality of such an impact—*i.e.,* whether interstate transportation or the flow of commerce across state lines would tend to be impeded if the business immediately involved, and others like it, were disrupted as a result of a labor dispute caused by unfair labor practices. If so, the Act applies regardless of the volume of interstate commerce affected, provided that it is more than *de minimis. National Labor Relations Board* v. *Denver Building & Construction Trades Council, supra; Polish National Alliance* v. *National Labor Relations Board, supra,* 322 U.S. at 648; *National Labor Relations Board* v. *Bradford Dyeing Assn.,* 310 U.S. 318, 326; *National Labor Relations Board* v. *Fainblatt, supra,* 306 U.S. at 607–608. That test is satisfied here by showing, without more, that the Company purchased more than $650,000 worth of fuel

[7] In *Denver Building*, this Court found that the Board had jurisdiction both because the employer purchased almost all its merchandise either directly or indirectly from outside the State (approximately $86,000 worth) and it shipped $5000 of its products outside the State.

oil from Gulf, which the latter concededly obtained from outside the State. For a shut down of the Company due to a labor dispute would cause it to discontinue purchasing that amount of oil from Gulf, and it is likely that this, in turn, would force Gulf to curtail, or at least delay, further shipments of oil into the State. The potential obstruction to $650,000 worth of out-of-State oil shipments as a result of a labor dispute involving respondent is certainly not *de minimis,* and the impact on commerce is even more substantial when there is added the danger that a labor dispute involving respondent may, if unchecked, spread to other fuel oil dealers in the area. See *Polish National Alliance* v. *National Labor Relations Board, supra,* 322 U.S. at 648.

2. The holding of the court below is also inconsistent with the holdings of other courts of appeals. For example, the Ninth Circuit has held that "[t]he fact that the company, instead of itself buying all its supplies outside the state and shipping them in, * * * has some arrangement whereby someone else ships them in and then it buys them from the shipper after they come into the state, does not destroy the effect of the transactions on interstate commerce." *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. 2d 780, 784 (C.A. 9), certiorari denied, 312 U.S. 678. Accord, *National Labor Relations Board* v. *Van De Kamp's Holland-Dutch Bakers,* 152 F. 2d 818, 819–820 (C.A. 9); *National Labor Relations Board* v. *Cowell Portland Cement Co.,* 148 F. 2d 237, 242 (C.A. 9), certiorari denied, 326 U.S. 735; *National Labor Relations Board* v. *Edinburg Citrus Ass'n,* 147 F. 2d

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353, 354 (C.A. 5); *National Labor Relations Board* v. *El Dorado Co.*, 195 F. 2d 950, 955 (C.A. 8); *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980–981 (C.A. 8), certiorari denied, 323 U.S. 751; *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927, 930 (C.A. 6). Moreover, it has uniformly been held by the courts of appeals that it need not be shown that a labor dispute will actually impede interstate commerce in order for the Board to have jurisdiction. Thus, the availability of substitute facilities, or the amount of commerce actually impeded by the labor dispute, has been held to be immaterial to establish the Board's jurisdiction. *National Labor Relations Board* v. *El Dorado Co., supra*, 195 F. 2d at 952–953 (C.A. 8); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 452–453 (C.A. 5); *National Labor Relations Board* v. *Phoenix Mutual Life Ins. Co.*, 167 F. 2d 983, 985 (C.A. 7), certiorari denied, 335 U.S. 845.

3. The decision below is also inconsistent with the provisions of Section 14(c)(1) of the Act, which was added by the 1959 Landrum-Griffin Amendment (29 U.S.C. (Supp. II) 164(c)(1)). That section authorizes the Board, "in its discretion," by "rule of decision or by published rules," to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute

over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

By thus explicitly confirming the Board's authority to define classes or categories of employers in which it would decline to exercise jurisdiction, Congress recognized that the Board's jurisdiction may be defined in terms of the general effect upon commerce of labor disputes involving categories of employers, and need not turn upon a determination of the effect on commerce of any particular labor dispute. The Board's jurisdictional "standards prevailing upon August 1, 1959" were drawn in terms of the total volume of commerce involved for particular classes and categories of employers. Twenty-Third Annual Report, National Labor Relations Board, p. 8.

Section 14(c)(1) leaves no doubt that Congress was familiar with the precise jurisdictional standards in effect upon August 1, 1959. For non-retail businesses, the Board assumed jurisdiction over an employer which had "$50,000 outflow or inflow, direct or indirect"; "indirect inflow" was defined as "the purchase of goods or services which originated outside the employer's State but which he purchased from a seller within the State * * *." *Ibid.;* see *Siemons Mailing Service,* 122 NLRB 81. In the case of retail concerns, the jurisdictional requirement was "$500,000 gross volume of business." Twenty-Third Annual Report, *supra.* The present case, in which the respondent had more than $650,000 in "indirect inflow" and gross

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sales of more than $500,000, satisfied both of these standards. We submit that Section 14(c)(1), therefore, is an irrefragable answer to the Second Circuit's suggestion that the term "affecting commerce" does not, as a matter of statutory construction, cover the present case.

4. The consequences of the lower court's holding transcend this particular case. Since the early days of the Wagner Act, the Board, with judicial approval, has been asserting jurisdiction over a variety of local businesses which affect interstate commerce only indirectly—*i.e.*, through the purchase of goods or sales which originate outside the State, or through the sale of products or services to companies which are themselves engaged in interstate commerce or do business with such firms.[8] If the additional data required by the court of appeals is relevant to a determination of the jurisdictional question in this case, it would appear to be relevant in untold numbers of similar

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[8] In addition to the cases cited *supra*, pp. 12–13, see *Amalgamated Association* v. *Wisconsin Board*, 340 U.S. 383, 391; *Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36–37 (C.A. 2), affirmed, 341 U.S. 694; *Shore* v. *Building & Construction Trades Council*, 173 F. 2d 678 (C.A. 3); *National Labor Relations Board* v. *Herald Publishing Co.*, 239 F. 2d 410 (C.A. 9); *National Labor Relations Board* v. *Dixie Terminal Co.*, 210 F. 2d 538 (C.A. 6), certiorari denied, 347 U.S. 1015; *National Labor Relations Board* v. *El Paso-Ysleta Bus Line Co.*, 190 F. 2d 261 (C.A. 5); *National Labor Relations Board* v. *Aurora City Lines* (C.A. 7), February 2, 1962, 49 LRRM 2532.

cases as well.[9] This would call for a drastic revision of the procedures which have heretofore been utilized in the trial of jurisdictional issues and would impose a substantial burden on the Board's processes. Apart from the clear departure from established principles, there are thus compelling administrative considerations why the decision below warrants review by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1962.

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[9] The First Circuit has already followed the lead of the court below, in remanding for additional jurisdictional facts a case involving a local sand and gravel company. *National Labor Relations Board* v. *Benevento*, decided December 29, 1961, 49 LRRM 2307.

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APPENDIX

United States Court of Appeals for the Second Circuit

No. 15—September Term, 1961

(Argued September 29, 1961. Decided November 13, 1961)

Docket No. 26806

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

Before LUMBARD, *Chief Judge,* and FRIENDLY and SMITH, *Circuit Judges.*

On petition for enforcement of an order of the National Labor Relations Board, 129 NLRB No. 141. Enforcement denied. Remanded to the Board for further hearings and additional findings on the basis of the Board's jurisdiction.

Melvin Pollack, Attorney, National Labor Relations Board (Stuart Rothman, General Counsel; Dominick L. Manoli, Asso. Gen. Counsel; Marcel Mallet-Prevost, Asst. Gen. Counsel; and Solomon I. Hirsh, Attorney, National Labor Relations Board, on the brief), for petitioner.

Samuel H. Borenkind, New York, N.Y., for respondent.

SMITH, *Circuit Judge:*

This is a petition of the National Labor Relations Board, pursuant to Section 10(e) of the amended National Labor Relations Act, 29 U.S.C.A. 160(e), for enforcement of a Board order issued against respondent January 5, 1961 reported at 129 NLRB No. 141. Since the alleged unfair practices occurred in Massapequa, Long Island, New York, within this judicial circuit, this court has jurisdiction over the petition for enforcement under Section 10(e). Enforcement denied. Remanded for taking of further evidence and making of additional findings.

Respondent is engaged in the sale of fuel oil for heating purposes and in servicing oil burners and boilers. All of its customers are home owners located in the State of New York. During the calendar year 1959 the respondent purchased from Gulf Oil, which is concededly engaged "in commerce," fuel oil and related products valued at more than $650,000. The largest part of the product sold to respondent is refined outside the State of New York and delivered into Gulf's storage tanks in New York, from where it is shipped to Gulf's stationary storage tanks at Oceanside, Long Island without segregation according to customers. Respondent's trucks withdraw the oil from the Oceanside tanks and deliver it directly to customers.[1]

The respondent employs two principal groups of workers: oil burner service employees numbering approximately 10, and fuel oil drivers numbering approximately 11.

[1] The Board also found that respondent draws a certain amount of oil from other firms' tanks on a barter basis and that a portion of its purchases of truck parts is made outside of New York State which totals "a couple of hundred dollars at the most." As the Board did not rest its jurisdiction on these factors they will not be considered by the court.

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On September 28, 1959, Local 553 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, filed a petition with the Board in Case No. 2–RC–10280, seeking to represent a unit of respondent's servicemen which was later changed to include drivers as well. Previously, in the summer of 1958, Local 355 of the Retail, Wholesale and Department Store Union, AFL–CIO, had unsuccessfully attempted to organize the employees of respondent. Pursuant to the representation petition an election was held; Local 553 received 10 votes, Local 355 received 6 votes, one vote was cast for neither union and four votes were challenged.

Immediately after the election a so-called "shape-up" system was instituted carrying out a threat to institute such a system if Local 553 won the election and the extra-gallonage bonus previously paid drivers was discontinued. On February 14, 1960, Union President Flatow sent a letter to Packman, an officer of the respondent, stating that Local 355 represented a majority of the employees and demanding contract negotiations. The following day a meeting was held and after cursory examination of the signatures on membership cards held by Local 355 a contract was entered into, immediately following which the "shape-up" system was discontinued and the drivers reimbursed for wages lost. Thereafter the respondent withheld $140.00 in dues from employees' wages and remitted this sum to Local 355 during the period February 23 to April 5, 1960. The Board certified Local 553 on March 15, 1960, as the exclusive representative of respondent's employees pursuant to the findings of the Regional Director overruling the challenges to two of the challenged votes. Asserting that the employees had chosen another union, with whom a con-

tract had been signed, respondent refused to bargain collectively with Local 553.

The Board concluded that by its threats, promises, and changes in working conditions for the purpose of influencing the choice of a collective bargaining agent respondent violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1); and that by recognizing and entering into a collective bargaining agreement with Local 355 respondent violated Section 8(a) (2) and (1) of the Act, 29 U.S.C. § 158(a) (2) and (1), by rendering unlawful assistance. Moreover respondent's agreement to, and enforcement of, a contract provision which required membership in the unlawfully assisted union as a condition of employment violated Section 8(a) (3), (2) and (1) of the Act, 29 U.S.C. § 158(a) (3), (2) and (1). Finally, the Board concluded that respondent was guilty of a refusal to bargain in violation of Section 8(a) (5) and (1) of the Act, 29 U.S.C. § 158(a) (5) and (1).

The Board ordered respondent to cease and desist from the unfair labor practices found and from interfering, in any other manner, with the rights of employees guaranteed by Section 7 of the Act, 29 U.S.C. § 157. The Board also ordered respondent to withhold recognition from Local 355 and to cease giving effect to the bargaining agreement with it, unless and until that union is certified by the Board; to reimburse its employees for the dues checked off; and upon request to bargain collectively with Local 553.

Respondent resists enforcement on two grounds: (1) the Board failed to show any evidence of coercion; and (2) the Board was without jurisdiction of the subject matter since there was no showing of an effect upon commerce.

Granger, one of respondent's servicemen, testified that Packman, respondent's secretary and treasurer,

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pursued a course of conduct which was calculated to coerce the employees to reject Local 553 in favor of Local 355. Respondent attempts to meet this testimony by arguing that Granger was biased and inconsistencies in his testimony show he was unworthy of belief. But this is a question of credibility as to which the Board is normally the sole judge.[2] Moreover, Granger's testimony is corroborated by that of Benjamin Mendolia,[3] Kershow,[4] Graziano,[5] Sammis,[6] and Joseph Mendolia.[7]

The findings on the merits are adequate and adequately supported by substantial evidence. Reimbursement is appropriate under these circumstances. The Board's order, including the provision for reimbursement, must therefore be enforced if the Board had jurisdiction over the dispute.[8]

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[2] E.g., *NLRB* v. *Morris Fishman & Sons, Inc.*, 278 F. 2d 792 (3 Cir. 1960); *NLRB* v. *Steel, Metals, Alloys and Hardware Fabricators and Warehousemen, Local 810*, 274 F. 2d 688 (2 Cir. 1960); *Paramount Cap Mfg. Co.* v. *NLRB*, 260 F. 2d 109 (8 Cir. 1958).

[3] Stenographic Transcript of Testimony, 113.

[4] *Id.* at 81–3.

[5] *Id.* at 137.

[6] The witness stated that Packman told him that "You see what's happened to the drivers, and you men haven't been hurt as yet." *Id.* at 55.

[7] 146–8.

[8] Since the Board's finding of coercion in the selection of a representative is amply supported by the evidence it is unnecessary to discuss respondent's contention that it was required to bargain with Local 355 which was found to be an employer-assisted union. *NLRB* v. *Revere Metal Art Co.*, 280 F. 2d 96, 99–100 (2 Cir. 1960). Even if the employees underwent a genuine change of attitude based upon a self-induced reappraisal they would be unable to repudiate informally the outcome of the election, at least after certification, for a reasonable period. *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954).

The Board appears to assume that any employer, whose business exceeds the Board's "jurisdictional" minimum of $500,000, who purchases materials from storage within the state the origin of which is without the state, if involved in a labor dispute necessarily affects commerce within the meaning of the Act.

The findings of the Board on effect on commerce here, perhaps because of reliance on *NLRB* v. *Pease Oil Co.*, 279 F. 2d 135 (2 Cir. 1960), are quite meager consisting of the following:

> The respondent is a New York corporation, with its principal office and place of business in Massapequa, Long Island, New York. It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers. All its customers are homeowners located in the State of New York. During the fiscal year ending June 30, 1959, the Respondent's gross sales exceeded $500,000. During the calendar year 1959 the Respondent purchased from Gulf Oil Corporation, herein called Gulf, fuel oil and related products valued at more than $500,000. Most of the product delivered to the Respondent is refined outside the State of New York and delivered into Gulf's storage tanks at New York, New York. It is then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, New York, without segregation according to customers. The Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to the Respondent's customers, or to the Respondent's tanks at Massapequa, from which it is later withdrawn and delivered to customers. The Respondent also obtains some fuel oil by exchange with other fuel oil companies on Long Island. This operates as follows: The Respondent draws a certain amount of oil from the other firm's tanks; conversely the

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other firm draws the same amount of oil from the Respondent's tanks. It is a barter operation, without the payment of money. The Respondent has on occasions obtained truck parts directly from outside the State of New York. In 1959, these purchases totaled "a couple of hundred dollars at the most." Other than this, the Respondent made no purchases of any kind directly from outside the State.

Gulf is engaged in the nonretail and retail sale of fuel oils and related products. It operates in New York and in other States. Its gross sales and operating revenues in 1959, including consumer excise taxes, amounted to in excess of $3,170,000,000. The Respondent and the Party to the Contract concede, and I find, that at all material times Gulf was engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

These findings are based on this statement by the Law Department of Gulf:

Gulf Oil Corporation is engaged in non-retail and retail business; sales and other operating revenues (including consumer excise taxes) for 1959 according to Annual Report amounted to $3,170,847,000.

Question No. 1: What was the gross amount of sales of all items sold to Reliance Fuel Oil Corp. during a twelve-month period?

Answer: For the year 1959: $669,805.

Question No. 2: Were most of the products sold by Gulf Oil Corp. to Reliance received by Reliance from sources outside the State of New York?

Answer: At present time, most of product delivered to Reliance is refined outside state and delivered into Gulf's terminal storage within state (New York City); redelivered into local Gulf storage on Long Island (not segregated for this customer); again redelivered to cus-

tomer at or from Gulf's local Long Island storage.

The Supreme Court, however, seems never to have gone so far as to hold that mere size of a local business or amount of its purchases within the state of materials the origin of which was outside the state, without relation to other factors necessarily brings it within the Act.

In *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 197 (1938), the Court declined to place its holding on the purchases of oil, coal, etc., although very large, which came from without the state.

> [W]hether or not particular action in the conduct of intrastate enterprises does affect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise.

Black, *J.,* concurring in *Polish Alliance* v. *Labor Board,* 322 U.S. 643, 652 (1944):

> The doctrine that Congress may provide for regulation of activities not themselves interstate commerce, but merely "affecting" such commerce, rests on the premise that in certain fact situations the federal government may find that regulation of purely local and intrastate commerce is "necessary and proper" to prevent injury to interstate commerce. *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U.S. 342; *Second Employers' Liability Cases,* 223 U.S. 1, 46–47; and see *Wickard* v. *Filburn,* 317 U.S. 111, 121. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount federal regulation, *City of Yonkers* v. *United States,* 320 U.S. 685, and cases therein cited. It has insisted upon "suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of

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> state power, the justification of the exercise of the federal power must clearly appear." *Id.; Florida* v. *United States,* 282 U.S. 194, 211–212; cf. *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 196–197; *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U.S. 80, 92–95."

The Supreme Court has stated that the Congress used the full extent of its power under the commerce clause in this legislation. *Polish Alliance* v. *Labor Board, supra,* 647. The Court has never, however, held that local regulation of labor relations in local commerce was completely superseded. At the time of enactment of the Wagner Act the Congress was not sure of the limits of its power. Since the courts had defined commerce quite broadly in the interests of employers affected by strikes of miners and stone cutters, it was felt that regulation of labor relations could be upheld in industries affecting commerce on the same basis.[9] The limits of the concept "affecting commerce" have since been defined by the Supreme Court on a case by case basis in a number of instances.[10] The federal field, in the process of definition has appeared to be steadily expanding. See Cox, Federalism in the Law of Labor Relations, 1954, 67 Harvard Law Review 1297. It may be that eventually the Congress will attempt more specifically to define the limits. As yet we cannot be certain of the extent

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[9] 79 Cong. Rec. 9682 (Rep. Connery), 74th Cong., 1st Sess. (1935). "The Supreme Court has said again and again, in the Coronado case and in the Stonecutters case that anything that affects interstate commerce, as far as a labor dispute is concerned, which burdens or obstructs interstate commerce, can be regulated under the commerce clause of the Constitution."

[10] E.g., *NLRB* v. *Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937); *NLRB* v. *Fainblatt*, 306 U.S. 601 (1939); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *Howell Chevrolet* v. *NLRB*, *infra; Polish Alliance* v. *Labor Board*, *supra.*

of the exercise of federal power, but must take each case as it comes up and fit it into the framework so far constructed.

On this question the Board relies on two cases in this circuit, *NLRB* v. *Van Deusen,* 138 F. 2d 893, 895 (2 Cir. 1943), *NLRB* v. *Pease Oil Co., supra,* and on *NLRB* v. *Townsend,* 185 F. 2d 378 (9 Cir. 1950). None of these furnish very reliable support to the Board. In *Van Deusen* there was business in interstate commerce involved, or alternatively an effect on commerce by diversion of goods from interstate to intrastate business to replace production halted by the dispute. In *Pease Oil* the point as to affecting commerce was not considered. *Townsend,* an automobile retailer case, does use broad language supporting the Board's claim here. The Supreme Court, however, in *Howell Chevrolet Co.* v. *NLRB,* 346 U.S. 482 (1953), in affirming another 9th Circuit case which had cited *Townsend, NLRB* v. *Howell Chevrolet Co.,* 204 F. 2d 79 (9 Cir. 1953), relied almost wholly on the interdependence of Howell's local and General Motors' national activities due to the detailed supervision permitted by the agency agreement.

It may be that today the Court would answer in the affirmative the question it left pending in *Consolidated Edison.* In view of the caution expressed in *Howell,* and in the concurring opinion in *Polish Alliance,* however, we may be sure that a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue. We cannot tell from the meager record before us anything about the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Reliance's proportion of Gulf's com-

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merce in the relevant market, or the number and availability of alternate distributors to Gulf and to Reliance's customers.[11] While volume of commerce affected is not in itself material, such factual findings might well throw light upon the manner in which a stoppage at Reliance would affect commerce, if at all. We therefore decline to enforce the order at this time upon the record before us. Compare *NLRB* v. *Mid-Co. Gasoline Co.*, 172 F. 2d 974 (5 Cir. 1949), *Stauffer* v. *Exley*, 184 F. 2d 962, 967–68 (9 Cir. 1950). The case is remanded to the Board with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce.

United States Court of Appeals,
for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and sixty-one.

Present:

Hon. J. EDWARD LUMBARD, *Chief Judge;* Hon. HENRY J. FRIENDLY, Hon. J. JOSEPH SMITH, *Circuit Judges.*

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[11] While we are aware that alternative sources of supply do not necessarily negate a finding of jurisdiction, *Labor Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 326 (1940), it seems essential that the court be enlightened as to the factual relationships involved.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

Petition for enforcement from the National Labor Relations Board.

This cause came to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that said enforcement be and it hereby is denied and that the action be and it hereby is remanded to the National Labor Relations Board with instructions to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce, in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

United States Court of Appeals
for the Second Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

On Motion of N.L.R.B. for Rehearing

Petition for rehearing denied.

Section 2(7) of the National Labor Relations Act defines "affecting commerce" as "in commerce, or burdening or obstructing commerce or the free flow of

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commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." Therefore, if the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had at one time moved in interstate commerce, it would have been easy enough to say so.

The case of *Wickard* v. *Fillburn,* 317 U.S. 111 (1942), urged upon us by the Board's petition for rehearing is inapplicable here. In that case the Supreme Court was dealing with a statute which was clearly broad enough to apply to the defendant's activities, and the only question before the court was the constitutionality of that statute. In the case at bar, the constitutionality of regulating the defendant's labor dispute is clear, and we are faced with a question of statutory interpretation. In the resolution of this question, the findings called for in the opinion are required.

January 4, 1962.

United States Court of Appeals
for the Second Circuit

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of January, one thousand nine hundred and sixty-two.

Present: Hon. J. EDWARD LUMBARD, *Chief Judge;* Hon. HENRY J. FRIENDLY, Hon. J. JOSEPH SMITH, *Circuit Judges.*

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION, RESPONDENT

A petition for a rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 88

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

RELIANCE FUEL OIL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinions of the court of appeals (R. 161-170, 183-184) are reported at 297 F. 2d 94. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 3-41) are reported at 129 NLRB 1166.

JURISDICTION

The judgment of the court of appeals remanding the case to the Board was entered on November 13,

1961 (R. 170), and on January 4, 1962 the court denied the Board's petition for rehearing (R. 185). The petition for a writ of certiorari was filed on April 4, 1962, and was granted on May 21, 1962 (R. 186), 369 U.S. 883. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 28-31.

QUESTION PRESENTED

Whether the Board may properly conclude that the operations of an employer engaged in an otherwise local business "affect commerce" within the meaning of the National Labor Relations Act by reason of the fact that he purchases, within the State, substantial quantities of supplies from a supplier who has imported them from outside the State.

STATEMENT

A. The Board's Decision and Order

The Board found that respondent violated Section 8(a)(1), (2), (3) and (5) of the Act by, *inter alia*, according exclusive recognition to Retail Local 355[1] at a time when it was obligated to recognize Team-

[1] Amalgamated Local Union 355, Retail, Wholesale and Department Store Union, AFL-CIO.

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sters Local 553,[2] by refusing to bargain with Local 553, and by restraining and coercing its employees to abandon Local 553 and join Local 355 (R. 4-5, 35, 20-23, 24-27, 28-29, 29-31, 32-34). The Board ordered respondent to cease and desist from the unfair labor practices found, and to take appropriate affirmative action to undo the effects of its illegal conduct (R. 5-6). The only question here is whether the Board properly determined it had jurisdiction over respondent's operations (R. 10-12). The underlying facts on this issue are as follows:

Respondent Reliance is a New York corporation with its principal office and place of business in Massapequa, Long Island, New York (R. 10). It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers (*ibid.*). Reliance has about 8,000 customers, all of whom are homeowners residing in the State of New York (R. 10, 159). During the fiscal year ending June 30, 1959, respondent delivered approximately 6,750,000 gallons of fuel oil to its customers, amounting to gross sales in excess of $500,000 (R. 10, 82-83). During the calendar year 1959, Reliance purchased from the Gulf Oil Corporation fuel oil and related products valued at more than $650,000 (R. 10, 45-46, 115). Gulf Oil Corporation, which is engaged in the retail and non-retail sale of fuel oil and related products, operates in New York and other States, and is

[2] Coal, Gasoline, Fuel Oil Teamsters, Chauffeurs, Oil-Burner Installation, Maintenance Servicemen and Helpers, Local Union 553, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

concededly engaged in interstate commerce (R. 10-11, 114, 115-116). Gulf's gross sales and operating revenues in 1959, including consumer excise taxes, exceeded $3,170,000,000 (*ibid.*).

Most of the products sold and delivered to Reliance by Gulf are refined by the latter outside New York State, delivered into Gulf's storage tanks at New York City, and then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, without segregation according to customers (*ibid.*). Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to Reliance's customers or to Reliance's tanks at Massapequa, from which it is later withdrawn and trucked to the consumers (R. 10, 85-86, 152-153). The consumers pay respondent for the oil by either giving the money to the driver at the time of delivery, or making their remittance by mail shortly thereafter (R. 154-155).

On the basis of these facts,[3] the Board found that respondent's operations affected interstate commerce within the meaning of the Act (R. 12), and that respondent's unfair labor practices "tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act" (R. 35-36).[4]

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[3] The record also showed that in 1959, Reliance purchased a few hundred dollars worth of truck parts in New Jersey (R. 152). In asserting jurisdiction, however, the Board did not rely on these transactions.

[4] Viewing respondent as a "retail concern" and finding its gross sales in excess of $500,000 per year, the Board concluded that its discretionary standards for the exercise of jurisdiction were satisfied (R. 11). See note 14, *infra*, pp. 22-23.

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B. The Decision of the Court of Appeals

The court below was satisfied that the Board's findings on the merits were "adequate and adequately supported by substantial evidence," and concluded that the Board's order should be enforced in full "if the Board had jurisdiction over the dispute" (R. 165). However, the court thought the evidence in the record insufficient to sustain jurisdiction and remanded the case to the Board "to take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce" (R. 170).

Noting that in *Edison Co.* v. *Labor Board*, 305 U.S. 197, and *Howell Chev. Co.* v. *Labor Board*, 346 U.S. 482 (discussed *infra*), the jurisdictional determination was not predicated on substantial intrastate purchases of products which originated outside the State, the court below expressed doubt as to whether that fact alone would be sufficient to permit Congress to regulate a local business (R. 167, 169). Accordingly, it concluded that (R. 169), "a reasonably complete picture of the manner in which a work stoppage would affect commerce should be required before we rule on the jurisdictional issue." Explaining the remand, the court stated (R. 169):

> We cannot tell from the meager record before us anything about the volume of commerce in heating oils in the relevant market, Gulf's participation therein, Reliance's contract relationship, if any, with Gulf's national distribution system, Reliance's proportion of Gulf's commerce in the relevant market, or the number and availability of

alternate distributors to Gulf and to Reliance's customers.[11] While volume of commerce affected is not in itself material, such factual findings might well throw light upon the manner in which a stoppage at Reliance would affect commerce, if at all.

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[11] While we are aware that alternative sources of supply do not necessarily negate a finding of jurisdiction, *Labor Board* v. *Bradford Dyeing Ass'n*, 310 U.S. 318, 326 (1940), it seems essential that the court be enlightened as to the factual relationships involved.

The Board's petition for rehearing (R. 173-183) was denied in a supplemental opinion (R. 183-184) holding that it was "clear" that Congress could constitutionally regulate the labor dispute in question, and that the problem presented was only one of statutory interpretation (R. 184). After construing the definition of "affecting commerce" in Section 2(7) of the Act, the court concluded (*ibid.*):

> [I]f the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had

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at one time moved in interstate commerce, it would have been easy enough to say so.

SUMMARY OF ARGUMENT

The court of appeals held, in both its initial opinion and its opinion denying the Board's petition for rehearing, that a local business may not be deemed to affect commerce within the meaning of Section 2(7) of the Act merely because it purchases substantial quantities of supplies which originated outside the State. This holding is erroneous and contrary to settled principles.

1. The ultimate holding below, that, while respondent's business is amenable to regulation by Congress under the commerce power, it is not subject to the Board's jurisdiction, is a contradiction. For this Court has consistently held that in the National Labor Relations Act "Congress meant to reach to the full extent of its power under the Commerce Clause." *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3. And, as the court below apparently agreed, there is no doubt that Congress' constitutional power extends to a business which affects commerce only by reason of purchasing substantial quantities of supplies that originate out-of-state. The full sweep of Congress' power under the Commerce Clause is not limited to operations that are "in commerce," but extends to local and intrastate activities which, "even if [they] be local and though [they] may not be regarded as commerce * * * [exert] a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined

as 'direct' or 'indirect.'" *Wickard* v. *Filburn*, 317 U.S. 111, 125.

Applying that test here, the Board's statutory jurisdiction over respondent is established, without more, by the fact that, during the year preceding the unfair labor practices, it purchased in excess of $650,000 worth of fuel oil from Gulf, most of which the latter concededly obtained from outside the State. A shutdown of respondent's plant due to a labor dispute would cause it to discontinue purchasing that amount of oil from Gulf, and this, in turn, would force Gulf to curtail, or at least delay, further shipments of oil into the State. The result is obviously a "substantial economic effect on interstate commerce."

2. In any event, the breadth of the Commerce Clause to one side, it is clear the Act grants the Board jurisdiction over intrastate businesses whose source of supply is out of state. Section 2(7) of the Act does not require proof that an unfair labor practice affecting such a business will actually "burden" or "obstruct" interstate commerce. The legislative findings incorporated in Section 1 establish a conclusive presumption that the activities prohibited will impede the free flow of commerce. If the business affected by the unfair labor practice has a substantial connection to interstate commerce, as here, the injurious result will be assumed, without considering all possibly mitigating factors.

The tie with commerce may be established by indirect, as well as direct, imports from out of state. Nor does the relative volume of the commerce affected in the particular case matter, or the availability of

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other markets for the goods imported. Congress so indicated in Section 14(c) of the Act which approves jurisdictional standards stated in terms of absolute figures of direct or indirect imports or exports interstate. So long as it is not *de minimis*, potential injury to any fraction of the total commerce in the commodities involved is sufficient. Here the volume of out-of-state imports, gauged in absolute terms, is clearly sufficient to justify the Board's exercise of jurisdiction.

ARGUMENT

The Operations of an Employer Engaged in an Otherwise Local Business "Affect Commerce" Within the Meaning of the National Labor Relations Act if He Purchases, Within His State, Substantial Quantities of Merchandise From a Supplier Who Had Imported Them From Outside the State

Section 10(a) of the National Labor Relations Act gives the Board power "to prevent any person from engaging in any unfair labor practice * * * affecting commerce." The phrase "affecting commerce" is defined in Section 2(7) to mean "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." And "commerce," of course, includes interstate or foreign "trade, traffic, commerce, transportation, or communication." Section 2(6). The court of appeals, in both its opinions, held that a local business may not be deemed to affect commerce within the meaning of the Act merely by virtue of the fact that it purchases substantial quantities of supplies which originated outside the State.

In its initial opinion, the court was apparently of the view that Congress lacked constitutional power to regulate a business whose impact on interstate commerce rests on nothing more than such purchases. In its supplemental opinion filed on the denial of rehearing, the court recognized that Congress had constitutional power to do so, but concluded that the Act did not give the Board all the power which Congress could constitutionally confer under the Commerce Clause. As it interpreted the Act (R. 184):

> * * * Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not directly or indirectly burden or obstruct interstate commerce. Had Congress meant to give the Board jurisdiction of all labor disputes involving employers who purchased more than a *de minimis* amount of supplies which had at one time moved in interstate commerce, it would have been easy enough to say so.

Finding the evidence insufficient to show how a work stoppage involving respondent would "burden" or "obstruct" commerce, the court remanded the case for further evidence and additional findings.

In short, the court held that, in order to assume jurisdiction under the Act, the Board must find that the particular labor dispute involved, unless arrested, will have an actual impact on commerce and that the purchase of substantial supplies originating outside the State is not, in itself, enough to show such an impact. This holding is plainly inconsistent with controlling decisions of this Court, with decisions of the courts of appeals, and with the provisions of Section 14(c)(1) of the Act.

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A. ***The jurisdictional coverage of the Act is coextensive with Congress' constitutional power to regulate commerce, and that power would reach the business here.***

It is well settled that the Board's legal jurisdiction is as broad as Congress could constitutionally confer. As this Court stated in *Guss* v. *Utah Labor Board*, 353 U.S. 1, 3:

> Since it was first enacted in 1935, the National Labor Relations Act has empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . [defined by the Act] affecting commerce." By this language and by the definition of "affecting commerce" elsewhere in the Act, Congress meant to reach to the full extent of its power under the Commerce Clause. [Footnotes omitted.]

Accord: *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 391; *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 647-648; *Labor Board* v. *Fainblatt*, 306 U.S. 601, 606-607; *Labor Board* v. *Jones & Laughlin*, 301 U.S. 1, 31. Hence, the court below was clearly in error when it held that, although Congress could constitutionally regulate a local business which affects commerce only by reason of purchasing substantial quantities of supplies that originate out-of-state, it did not go so far in the Act.

Nor can it be doubted, as the court below ultimately conceded, that Congress' constitutional power extends to a business having only such an "indirect" connection with interstate commerce. It is well settled that the full sweep of Congress' power under the Commerce Clause is not limited to operations that are in

commerce. "* * * [e]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" *Wickard* v. *Filburn*, 317 U.S. 111, 125. "The commerce power * * * extends to those activities intrastate which so affect interstate commerce * * * as to make regulation of them appropriate means to the attainment of * * * the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Ass'n*, 336 U.S. 460, 464.[5]

Thus, in *Wickard*, the Court sustained application of the production quotas of the Agricultural Adjustment Act to 239 bushels of wheat grown by a farmer purely for his own consumption, because Congress had found that the price of wheat was affected by the total supply and not merely the quantity offered for sale. In *Wrightwood Dairy*, it was held that the price controls of the Agricultural Marketing Act could properly be applied to milk which was produced and consumed wholly within the state, since it had an impact

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[5] See generally, Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 883 (1946).

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upon the price of milk sold in interstate commerce. And, in *United States* v. *Sullivan*, 332 U.S. 689, 697-698, the labeling requirements of the Food and Drug Act were held applicable to drugs which had been misbranded by a retail druggist after he had purchased them from a wholesaler within the state, the wholesaler having originally obtained them from out-of-state.

Under these principles it is clear that Reliance's substantial purchases of out-of-state fuel brings it within the scope of the Commerce Clause. This much the court of appeals concedes in its opinion on rehearing. It should follow that the Board had jurisdiction in this case. But, though it expressly acknowledged the rule in its first opinion, the court below now refuses to recognize that the constitutional limits of Congressional power and the jurisdiction of the National Labor Relations Board are co-extensive. Accordingly, we pursue the question, perhaps unnecessarily, without reference to the Commerce Clause, looking only to the provisions of the Act which define the scope of the Board's authority and the cases decided under it.

B. *Whether or not Congress exhausted its constitutional power to regulate commerce, the Act grants the Board jurisdiction over the unfair labor practices involved here.*

1. The conclusion of the court below, that the Board's jurisdiction over respondent could not be predicated merely on a showing that it purchased substantial quantities of oil which originated out-of-

state, appears to rest, in part at least, on the premise that the definition of "affecting commerce" in Section 2(7) established a "double test" for determining Board jurisdiction. The court pointed out (R. 183-184) that "affecting commerce" is defined as "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." From this, it concluded (*ibid.*):

> Therefore, if the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce. We believe that in enacting this double test Congress intended the courts to examine whether or not a labor dispute involving only employers not engaged in interstate commerce did or did not *directly or indirectly* burden or obstruct interstate commerce [emphasis added].

We submit the court read too much into the definition. There is no basis for assuming that Congress was here drawing a fine line between unfair labor practices involving interstate businesses and those involving intrastate businesses. Clearly, every unfair labor practice, wherever occurring, which, directly or indirectly, interferes with the free flow of commerce between the States is subject to the Act. Of course, the effect on commerce may be more or less immedi-

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ate, and it may be more or less obvious.[6] But Congress did not distinguish between unfair labor practices which are *per se* burdens on commerce, because they occur in an industry directly involved in interstate commerce, and unfair labor practices in other businesses, the adverse effect of which must be established by a particular quantum of proof. On the contrary, as this Court has recognized, *supra*, pp. 11-13, the statutory definition of "affecting commerce" was intended to go as far as Congress could to prevent undue obstruction of commerce.

2. Starting from the erroneous premise that, because Reliance is not itself directly involved in inter-

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[6] Accordingly, every case must be judged on its own facts, as this Court said in *Edison Co.* v. *Labor Board*, 305 U.S. 197. Nothing more can be made of the passage relied on by the court below (R. 167). Nor is Mr. Justice Black's concurring opinion in *Polish Alliance* v. *Labor Board*, 322 U.S. 643, 652, dispositive of the question. Certainly, "clear findings" are required when the limits of constitutional power are reached. But the issue here is whether those findings need include matters which this Court has said are irrelevant. Mr. Justice Black, in the passage quoted (R. 167-168), was merely criticizing the majority of the Court for affirming the Board's decision on grounds which the Board had not considered. The Board had found—and Mr. Justice Black agreed—that it had jurisdiction over the employer because the insurance company "was itself 'engaged in commerce.'" 322 U.S. at 651. The majority opinion, written by Mr. Justice Frankfurter, held that the Board had jurisdiction because the employer's "insurance activities merely affected commerce in types of interstate business other than its own." *Ibid.* The concurring opinion observed that "[o]n this fact issue [the Board] made no finding at all." *Ibid.* Cf. *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, decided the same day as *Polish Alliance*.

state commerce the situation warranted special scrutiny, the court of appeals required further proof of the injurious effect of the work stoppage here. It was not satisfied with the conceded fact that a substantial portion of respondent's supplies originate out-of-state. It wanted to know exactly what impact a labor dispute involving Reliance would have on these interstate transactions. In short, the court below required proof of *actual*[7] injury to interstate commerce. In this, it was clearly wrong.

Indeed, in Section 1 of the Act, 29 U.S.C. 151, Congress itself made the finding that labor disputes in industries tied to interstate commerce have "the necessary effect of burdening or obstructing [interstate] commerce." And there has been no retreat from that position. On the contrary, in 1959 Congress added Section 14(c)(1) (*infra*, p. 31), which expressly approves the Board's prevailing practice of testing jurisdiction without inquiring about the actual effect of the labor dispute on interstate commerce.[8] Plainly, Congress here reiterated its finding that labor troubles occur-

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[7] We do not mean to suggest that the court of appeals thought the injury must have already occurred. Such a holding would of course defeat the preventive purpose of the Act. See *Labor Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 326; *Edison Co.* v. *Labor Board*, 305 U.S. 197, 222. But the court did require proof that obstruction of interstate commerce would actually result. It refused to indulge the presumption that injury was likely.

[8] The proviso to § 14(c)(1) enjoins the Board from "declin[ing] to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."

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ring in any enterprise of more than minimal size with some out-of-state connection do adversely affect interstate commerce. That assumption need not be reexamined. The deleterious effect of unfair labor practices is conclusively presumed.[9] The only inquiry open is whether the tie between the business involved and commerce is sufficiently close to bring that presumption into play.

3. An intrastate business may, of course, have such ties with interstate commerce as to fall within the purview of the Act. See, *e.g.*, *Edison Co.* v. *Labor Board, supra*; *Labor Board* v. *Fainblatt, supra*, 604-605; *Bus Employees* v. *Wisconsin Board, supra*, at 391-392. The only question here is whether obtaining supplies from out of the State is a sufficient connection.

The opinion below notes that in *Edison Co.* v. *Labor Board, supra*, at 220, this Court "laid to one side" evidence of very large out-of-state purchases in arriving at the conclusion that certain New York utilities were subject to the Act. But all this proves is that other facts in the case made it unnecessary for the

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[9] See *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983, 985 (C.A. 7), certiorari denied, 335 U.S. 845; *National Labor Relations Board* v. *Tex-O-Kan Flour Mills Co.*, 122 F. 2d 433, 436-437 (C.A. 5); *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. 2d 829, 831-833 (C.A. 3), certiorari denied, 314 U.S. 693; *National Labor Relations Board* v. *Alloy Cast Steel Co.*, 117 F. 2d 302, 303-304 (C.A. 6); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. 2d 539, 543 (C.A. 10); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 495 (C.A. 9), certiorari denied, 306 U.S. 643.

Court to decide the present issue. Similarly, in *Howell Chev. Co.* v. *Labor Board*, 346 U.S. 482, the Court did not base its holding solely on substantial out-of-state purchases, because it was unnecessary to do so. We note, however, that these transactions were not said to be irrelevant in either case, and that in *Howell* the Court did not put them "to one side." But, in any event, three other decisions of this Court resolve the issue. They are *Labor Board* v. *Denver Bldg. Council*, 341 U.S. 675; *Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20; and *San Diego Unions* v. *Garmon*, 353 U.S. 26.

The first case involved an electrical subcontractor who performed all of his services in one State but obtained most of his materials elsewhere. The Court also noted that the subcontractor's firm shipped some of its products out of the State, but the holding that the activities there complained of affected interstate commerce seems to be based almost wholly on the supposition that the unfair labor practices charged "might well result in substantially decreasing the influx of materials into Colorado from outside the State." *Labor Board* v. *Denver Bldg. Council, supra*, at 684. This reading is confirmed by the more recent *Meat Cutters* and *Garmon* cases, where the only ties with interstate commerce were through purchases, there being no out-state sales. In *Meat Cutters, supra*, at 22, the jurisdictional facts were summarized as follows:

> Respondent operates three meat markets in the vicinity of Akron, Ohio. All of its sales are intrastate, but of its purchases in one year total-

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> ing not quite $900,000, slightly more than $100,000 worth came from outside Ohio directly and as much or more indirectly.

And, in the companion *Garmon* case, Board jurisdiction was predicated solely on the employer's purchase of "more than $250,000 worth of material from outside of California for resale at retail" (353 U.S. at 27).

4. Two of the cases just discussed also dispose of another question. It is unimportant whether, as here, the purchase of out-of-state supplies was consummated in the State, or at the place of origin. Indeed, in both *Denver Building Council* and *Meat Cutters* the Court noted that a part of the business' purchases came "directly" from another State, while another part came in only "indirectly" from outside the State, but it treated both as equally significant in establishing the necessary connection with interstate commerce. And with good reason, for, obviously, the effect of an interruption in the flow of commerce is no less acute because there is a middle-man who also suffers the "pinch."

This is no new doctrine. Since the early days of the Act, it has been held that "[t]he fact that the company, instead of itself buying all its supplies outside the state and shipping them in * * * has some arrangement whereby someone else ships them in and then it buys them from the shipper after they come into the state, does not destroy the effect of the transactions on interstate commerce." *National Labor Board* v. *Sunshine Mining Co.*, 110 F. 2d 780,

784 (C.A. 9), certiorari denied, 312 U.S. 678.[10] As this Court observed in *Santa Cruz Co.* v. *Labor Board*, 303 U.S. 453, 463:

> A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity * * * where the actual movement is interstate, do not affect either the power of Congress or the jurisdiction of the agencies which Congress has established.

Accordingly, it makes no difference, for purposes of the Act, that the imported fuel oil was obtained by respondent from Gulf's storage tanks in Oceanside, New York, rather than directly from outside the State via railroad or ship; the potential effect of a labor dispute at respondent's plant on Gulf's interstate operations would be the same. See also, *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186; *Standard Oil Co.* v. *Federal Trade Commission*, 340

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[10] Accord: *National Labor Relations Board* v. *Local 1976, Carpenters*, 241 F. 2d 147, 152 (C.A. 9), affirmed, 357 U.S. 93; *National Labor Relations Board* v. *Vulcan Forging Co.*, 188 F. 2d 927, 930 (C.A. 6); *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 382-383 (C.A. 9), certiorari denied, 341 U.S. 909; *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 242 (C.A. 9), certiorari denied, 326 U.S. 735; *National Labor Relations Board* v. *Edinburg Citrus Ass'n*, 147 F. 2d 353, 354 (C.A. 5); *National Labor Relations Board* v. *Van Deusen*, 138 F. 2d 893, 895 (C.A. 2); *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. 2d 829, 833 (C.A. 3), certiorari denied, 314 U.S. 693.

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U.S. 231, 237-238;[11] *United States* v. *Sullivan, supra.*

5. Nor is it important whether the purchases made directly or indirectly from out of the State are relatively large or small in terms of the total volume of commerce in the commodity. That principle was established long ago. In *Labor Board* v. *Fainblatt, supra,* at 607, this Court said:

> Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis.*

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[11] The situation in *Standard Oil* is close to that here. Standard brought out-of-state gasoline to its terminal at River Rouge, Michigan, where it was stored for varying periods and then sold pursuant to individual orders to independent customers in Detroit. 340 U.S. at 236-237. "'Although the gasoline was not brought to River Rouge pursuant to orders already taken, the demands of the Michigan territory were fairly constant, and [Standard's] customers' demands could be accurately estimated, so the flow of the stream of commerce kept surging from [Standard's out-of-state refining plant] to Detroit.'" *Id.*, at 237. The Court concluded that the sales by Standard to its customers were "made in interstate commerce," within the meaning of the Robinson-Patman Act, notwithstanding the "temporary storage of the gasoline * * * within the Detroit area," expressly noting that the sales were "those of an interstate producer and refiner to a local distributor." *Id.*, at 238, n. 6. It would seem to follow, *a fortiori*, that such sales, which are the equivalent of Gulf's sales to respondent here, would satisfy the less stringent "affecting commerce" test of the National Labor Relations Act.

And the principle has been consistently followed. See *Labor Board* v. *Bradford Dying Assn.*, *supra*, at 326; *Labor Board* v. *Denver Bldg. Council*, *supra*, at 684; *Meat Cutters* v. *Fairlawn Meats*, *supra*, at 22-23.

Moreover, a fully informed [12] Congress itself recently approved jurisdictional standards which make relative percentages irrelevant. Section 14(c) of the Act (*infra*, p. 31), added in 1959 to eliminate the "no man's land," [13] expressly recognizes the limits of the Board's discretionary jurisdiction in absolute, not relative, terms. Indeed, for some categories of employers, the amendment in effect prohibits the Board to decline jurisdiction if the business has "an outflow or inflow across State lines of at least $50,000, whether such outflow or inflow be regarded as direct or indirect." See *Siemons Mailing Service*, 122 NLRB 81, 85.[14]

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[12] It is clear Congress was fully aware of the Board's "standards prevailing upon August 1, 1959." See II *Legislative History of the Labor-Management Reporting and Disclosure Act, 1959* (G.P.O., 1959) 1153(3)-1154(3), 1720(3); 105 Cong. Rec. 6548-6549, 18134.

[13] See II *Legislative History of the Labor-Management Reporting and Disclosure Act, 1959* (G.P.O., 1959), 1434(3)-1435(3), 1712; 105 Cong. Rec. 17901-17902, 18022. See also Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 261-262 (1959).

[14] While the quoted standard applies only to "nonretail" businesses, "instrumentalities, links, and channels of interstate commerce," and "public utilities" (as an alternate standard), see *Twenty-Third Annual Report*, National Labor Relations Board (G.P.O., 1959), p. 8, we suggest it serves also as a safe measure of the connection with interstate com-

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It follows, therefore, that "the [total] volume of commerce in heating oils in the relevant market" and "[the extent] of Gulf's participation therein" (R. 169), are not material considerations in determining the Board's jurisdiction.[15]

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merce for "retail concerns." If the Board takes jurisdiction of a case involving a "nonretail" employer merely because there is an "inflow" or "outflow" exceeding $50,000 per year, there is more reason for doing so when the employer in another class meets his own "standard" *and* imports or exports, directly or indirectly, more than $50,000 annually. (In the instant case, without rejecting the contention that Reliance was in the "nonretail" class, the Board apparently treated respondent as a retailer, subject to the $500,000 annual gross volume of business standard.)

[15] The immateriality of the additional commerce data sought by the court below in its remand of this case is shown by the history of *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 172 F. 2d 974 (C.A. 5), remanding 78 NLRB 740; 183 F. 2d 451 (C.A. 5), enforcing the Board's supplemental decision and order, 86 NLRB 448. When the case first came before the Fifth Circuit on the Board's petition for enforcement, the court, with Judge Hutcheson dissenting, remanded the case to the Board for additional information similar to that sought here. The Board accepted the remand and made the additional findings requested. In its supplemental conclusions, however, the Board pointed out that, regardless of the facts thus revealed, jurisdiction nonetheless existed under the principles established by this Court. When the case came again before the Fifth Circuit, that court, in an opinion by Judge Hutcheson, enforced the Board's order without reference to the detailed supplemental findings and quoted with approval the Board's conclusion that the additional data was immaterial.

6. Likewise irrelevant is "the number and availability of alternate distributors to Gulf and to Reliance's customers." (R. 169). The fact that substitute facilities may be available to fill the void created by a shutdown of the immediate employer's business does not deprive the Board of jurisdiction. *Labor Board* v. *Bradford Dyeing Assn., supra.*[16]

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[16] In its decision, the court below cited *Bradford Dyeing* for the proposition that "alternative sources of supply *do not necessarily* negate a finding of jurisdiction" (R. 169, n. 11, emphasis added). This Court, however, in holding that such factor was "not material," ruled it out altogether as a consideration. *Bradford Dyeing* has consistently been so interpreted by the courts of appeals. See, *National Labor Relations Board* v. *El Dorado Water Co., Inc.*, 195 F. 2d 950, 952 (C.A. 8); *National Labor Relations Board* v. *Davis Motors, Inc.*, 192 F. 2d 782-783 (C.A. 10); *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 382 (C.A. 9), certiorari denied, 341 U.S. 909; *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 452, 453 (C.A. 5); *J. L. Brandeis & Sons* v. *National Labor Relations Board*, 142 F. 2d 977, 980 (C.A. 8), certiorari denied, 323 U.S. 751; *National Labor Relations Board* v. *Bank of America*, 130 F. 2d 624, 626 (C.A. 9), certiorari denied, 318 U.S. 791, 792; *National Labor Relations Board* v. *Western Mass. Elec. Co.*, 120 F. 2d 455, 457 (C.A. 1); *Pueblo Gas & Fuel Co.* v. *National Labor Relations Board*, 118 F. 2d 304, 306 (C.A. 10); *Cudahy Packing Co.* v. *National Labor Relations Board*, 118 F. 2d 295, 299 (C.A. 10); *National Labor Relations Board* v. *Henry Levaur, Inc.*, 115 F. 2d 105, 109 (C.A. 1), certiorari denied, 312 U.S. 682; *Consumers Power Co.* v. *National Labor Relations Board*, 113 F. 2d 38, 40-41 (C.A. 6); Accord: *Virginian Ry Co.* v. *System Federation No. 40*, 300 U.S. 515, 557. But cf. *National Labor Relations Board* v. *Benevento*, 297 F. 2d 873, 875-876 (C.A. 1).

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7. The court below seems to suggest that the volume of respondent's out-of-state imports is, in absolute terms, *de minimis*, and therefore insufficient to justify the conclusion that interstate commerce will be affected by a disruption of its business activities. The short answer to this suggestion is that the almost $650,000 in out-of-state purchases here involved is many times the Board's jurisdictional floor of $50,000 [17] and well above the imports of $200,000 and $250,000 found sufficient in *Meat Cutters* and *Garmon*, respectively. Moreover, "[w]hether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *Labor Board*, *supra*, at 648.

The Board's statutory jurisdiction over respondent is established, without more, by the fact that, during the year preceding the unfair labor practices, it purchased in excess of $650,000 worth of fuel oil from Gulf, most of which the latter concededly obtained from outside the state. For a shutdown of respondent's operations due to a labor dispute would cause it to discontinue purchasing that amount of oil from Gulf, and, likely, this, in turn, would force Gulf to

[17] See note 14, *supra*.

curtail, or at least delay, further shipments of oil into the State. The potential obstruction to $650,000 worth of out-of-state oil shipments is well above *de minimis*, even without considering the additional danger that a labor dispute involving respondent may, if unchecked, spread to other fuel oil dealers in the country.[18]

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[18] In 1958, the latest year for which figures are available, there were 10,248 independent fuel oil dealers in the nation with total gross sales of $1,770,992,000. For the workweek ending nearest November 15, 1958, these dealers employed 43,401 men, with a payroll of $3,286,439. The total annual payroll during 1958 was $176,280,000. U. S. Department of Commerce, Bureau of the Census, *1958 Census of Business: Retail Trade, United States Summary* (G.P.O. 1961), Table 2, pp. 1-8. The National Fueloil Council, in its pamphlet, *Facts About Fueloil and Home Heating* (1959/60), states (p. 9) that, in 1958, 16,028,284 homes in this country were heated by oil, and new oil-burner installations for central heating were being made at the rate of 600,000 per year. The Council further states (p. 17) that independent fuel oil dealers account for 56 percent of the total volume of fuel oil sold to homes.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded with directions to enter a decree enforcing the Board's order.

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AUGUST 1962.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 541, 29 U.S.C. 151, *et seq.*) are as follows:

> Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

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Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Sec. 2. When used in this Act—

* * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

Sec. 10.(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision

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of this Act or has received a construction inconsistent therewith.

* * * *

Sec. 14. (c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(c) (2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

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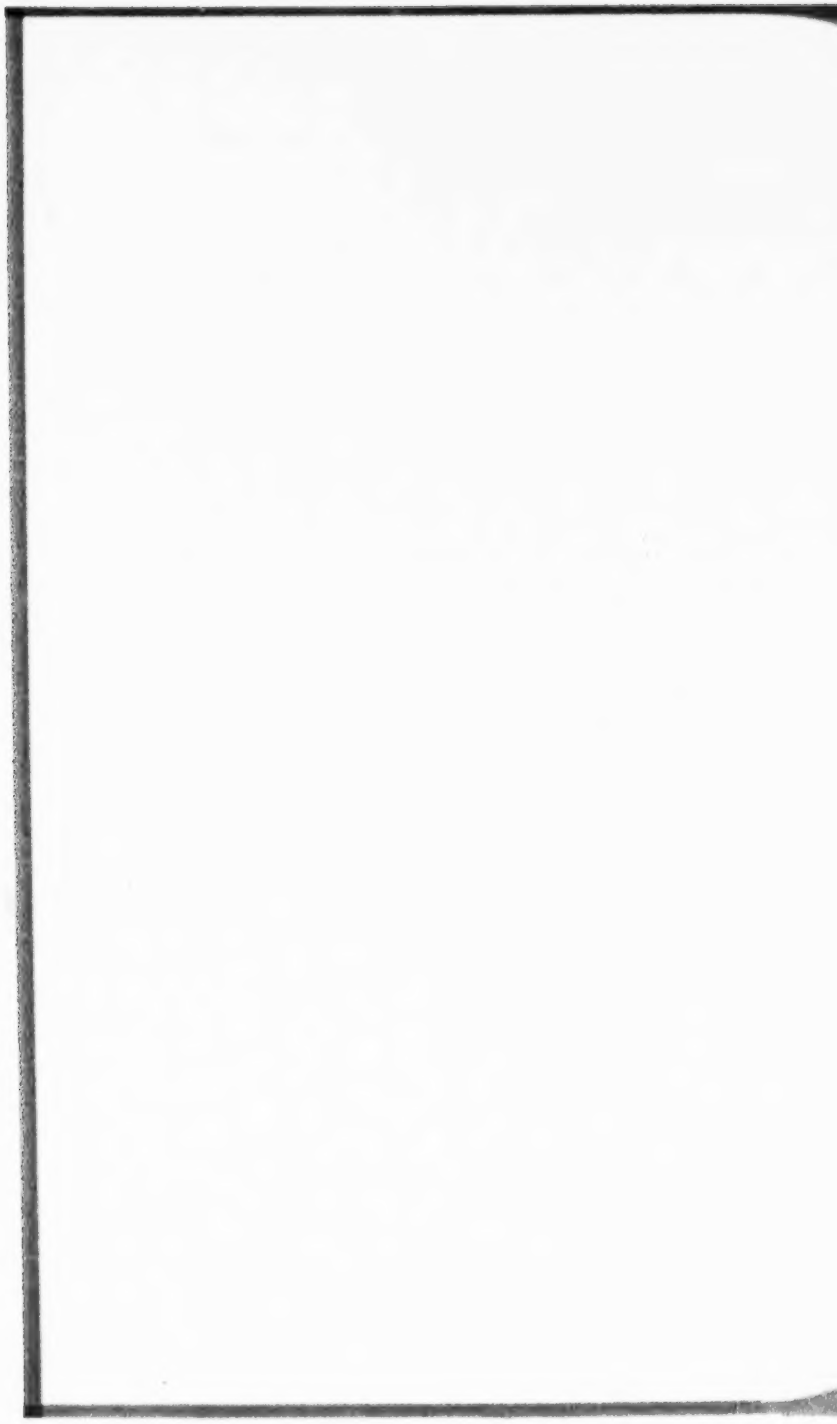

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 88

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RELIANCE FUEL OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RELIANCE FUEL OIL CORPORATION

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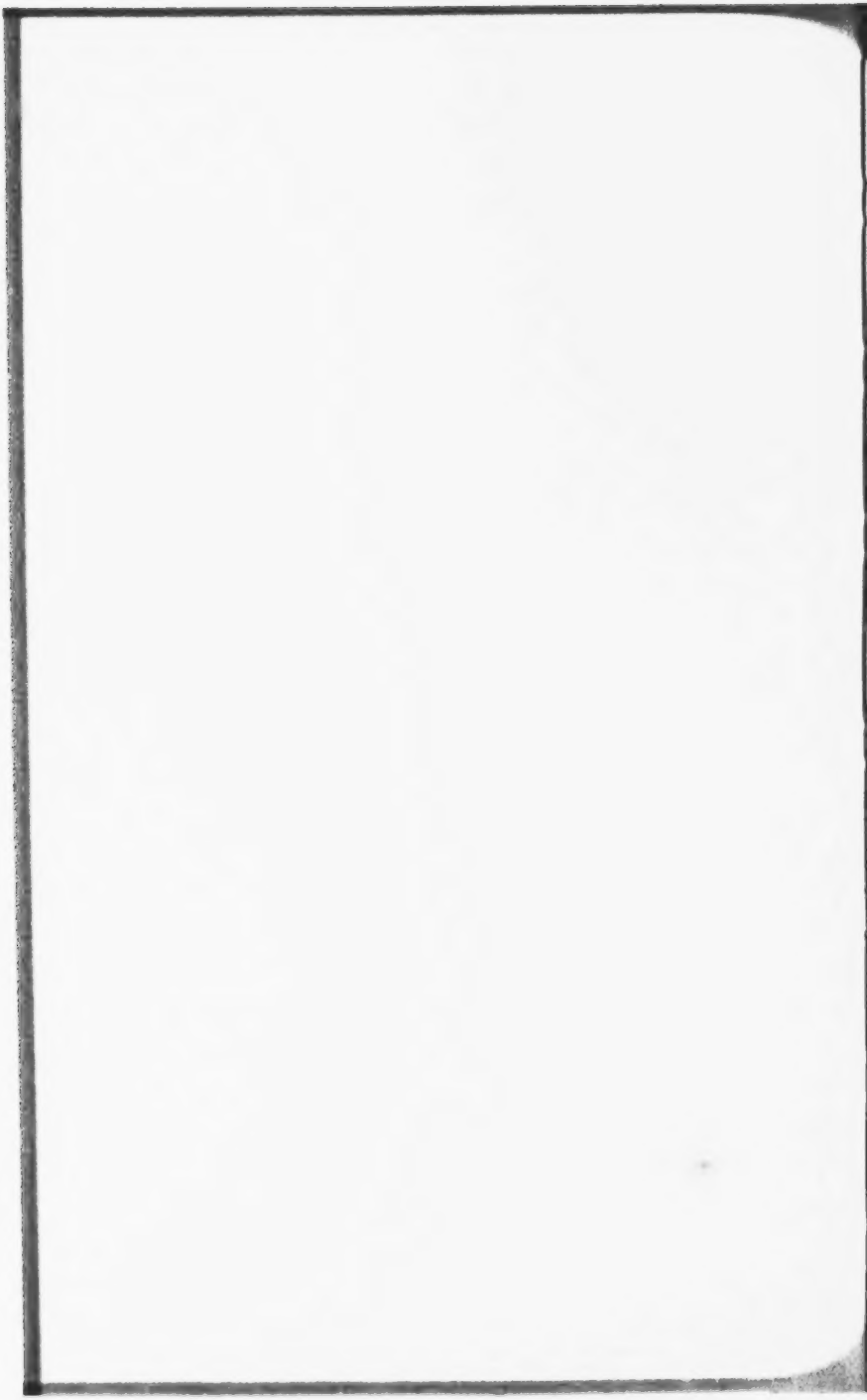

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OCTOBER TERM, 1962

No. 88

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

RELIANCE FUEL OIL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RELIANCE FUEL OIL CORPORATION

Question Presented

Whether the National Labor Relations Board, hereinafter referred to as the Board, may by establishing a dollar volume of business done by a local business concern assume jurisdiction within the meaning of the National Labor Relations Act, notwithstanding the fact that the purchases by the local business concern were from a supplier who has imported them from outside the State.

Statement

Respondent, Reliance, is a New York corporation with its principal office and place of business in Massapequa, Long Island, New York (R. 10). It is

engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers (ibid.). Reliance has about 8,000 customers, all of whom are homeowners residing in the State of New York (R. 10, 159). During the fiscal year ending June 30, 1959, respondent delivered approximately 6,750,000 gallons of fuel oil to its customers, amounting to gross sales in excess of $500,000 (R. 10, 82-83). During the calendar year 1959, Reliance purchased from the Gulf Oil Corporation fuel oil and related products valued at more than $650,000 (R. 10, 45-46, 115). Gulf Oil Corporation, which is engaged in the retail and non-retail sale of fuel oil and related products, operates in New York and other States, and is concededly engaged in interstate commerce (R. 10-11, 114, 115-116). Gulf's gross sales and operating revenues in 1959, including consumer excise taxes, exceeded $3,170,000,000 (ibid.).

Most of the products sold and delivered to respondent, Reliance, by Gulf are refined by the latter outside New York State, delivered into Gulf's storage tanks at New York City, and then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, without segregation according to customers (ibid.). Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to Reliance's customers or to Reliance's tanks at Massapequa, from which it is later withdrawn and trucked to the consumers (R. 10, 85-86, 152-153). The consumers pay respondent for the oil by either giving the money to the driver at the time of delivery, or making their remittance by mail shortly thereafter (R. 154-155).

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On the basis of these facts, the Board found that respondent's operations affected interstate commerce within the meaning of the National Labor Relations Act (R. 12), and that respondent's unfair labor practices "tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2 (6) and (7) of the Act" (R. 35-36).

The only question here relates to the propriety of the Board's conclusion that it has jurisdiction over respondent's operations because its gross business was in excess of $500,000, notwithstanding the fact that respondent was strictly and solely engaged in intrastate commerce.

ARGUMENT

The Board cannot under the relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, et seq.) assume jurisdiction by establishing a dollar amount of gross volume done for a company engaged solely in intrastate commerce.

Respondent was ordered by the National Labor Relations Board to cease and desist from committing unfair labor practices in violation of the National Labor Relations Act.[1] The Board had assumed jurisdiction of the matter since respondent's gross volume of business exceeded the Board's jurisdictional minimum of $500,000[2] and it purchased products from

[1] Specifically, Secs. 8(a) (1)-(a) (3), (a) (5) of the act, 49 Stat. 452 (1935), as amended, 29 U.S.C. Secs. 158(a) (1)-(a)(3), (a)(5) (1958) (Supp. II, 1959-1960).

[2] The Board's current standard for retail concerns is a gross yearly revenue of over $500,000. See NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958).

storage within the state whose origin was without the state.[3] After respondent's refusal to obey the order, the Board, pursuant to Section 10 (e) of the National Labor Relations Act,[4] petitioned the United States Court of Appeals for the Second Circuit for its enforcement. The Court held that the Board's findings on the merits were "adequately supported by substantial evidence"[5] but denied enforcement of the order and remanded the case to the NLRB "with instructions to take further evidence and make further findings on the manner in which a labor dispute (respondent) . . . affects or tends to affect commerce." *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F. 2d 94, 99 (2d Cir. 1961).

Shortly after the decision in Reliance, but before rehearing was denied, the United States Court of Appeals for the First Circuit reached the same conclusion in *NLRB* v. *Benevento.*[6] With the same question before it,[7] the court remanded the case to the Board to make "clear findings of fact based upon legally sufficient evidence . . . to support its assertion of jurisdiction."[8]

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[3] *N.L.R.B.* v. *Reliance Fuel Oil Corp.*, 297 F.2nd 94 (2d Cir. 1961). Respondent also had purchased truck parts valued at no more than a few hundred dollars from out of state. However, as the Board did not rest its jurisdiction on this, the court did not consider it. Id. at 95 n.l.

[4] 49 Stat. 454 (1935), as amended, 29 U.S.C. Sec. 160 (e) (1958).

[5] *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F. 2d at 96.

[6] 297 F. 2d 873 (1st Cir. 1961).

[7] In Benevento, the Board applied its current $50,000 outflow or inflow standard for nonretail concerns. See NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958).

[8] 297 F. 2d at 876.

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The Wagner Act of 1935[9] grants jurisdiction to the NLRB over all employers engaged in interstate commerce or whose businesses affect interstate commerce. Section 2(7) of the act defines the term "affecting commerce" as:

> "In commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."[10]

It has been said that this grant of jurisdiction goes to the full extent of Congress' constitutional power[11] to prevent obstructions to interstate and foreign commerce[12] and that ultimately there is no business which is not subject to the act."[13]

The constitutionality of the Wagner Act was upheld in *NLRB* v. *Jones & Laughlin Steel Corp.*,[14] where the Supreme Court acquiesced in the Board's

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[9] National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. Sec. 151 (1958). This was subsequently amended by the Labor Management Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. Sec. 141 (1958) and the Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959), as amended, 29 U.S.C. Secs. 401-531 (Supp. II, 1959-1960), so that the composite is the present federal law in the field of labor relations.

[10] 49 Stat. 450 (1935), 29 U. S. C. Sec. 152 (7) (1958).

[11] U. S. Constitution, art. 1, Sec. 8. "The Congress shall have Power . . . To regulate Commerce . . . among the several States, (and) . . . To make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers . . ."

[12] *International Bhd. of Elec. Workers* v. *NLRB*, 181 F.2d 34, 36 (2d Cir. 1950).

[13] Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297, 1299 (1954).

[14] 301 U. S. 1 (1937).

ad hoc method of asserting jurisdiction.[15] In *Consolidated Edison Co.* v. *NLRB*,[16] the Court again approved the Board's ad hoc method[17] of asserting jurisdiction. The Court, however, did not predicate the Board's jurisdiction on a certain dollar value of out-of-state purchases but rather on the fact that many industries, themselves involved in interstate commerce, were supplied by Consolidated Edison.[18]

Both Jones & Laughlin and Consolidated Edison dealt with large corporations engaged in extensive interstate activities. But what of the small businessman whose products come from or reach interstate commerce? *NLRB* v. *Fainblatt*[19] made it clear that volume of business had little bearing on the applicability of the act.[20] The criterion, the Court said, was

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15 "Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise." Id. at 32.

16 305 U.S. 197 (1938).

17 Id. at 222.

18 In the instant case, the Board argued that this only infers that "where other, more dramatic, evidence of a connection with interstate commerce was present, the Court found it unnecessary to rest the case on the 'lesser' factors as well." Brief for Petitioner on Rehearing, p. 10. *NLRB* v. *Reliance Fuel Oil Corp.*, 297 F.2d 94 (2d Cir. 1962).

19 306 U.S. 601 (1939).

20 "The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small . . . The language of the National Labor Relations Act seem to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved." Id. at 606. It should be noted that while the Court here was referring to an extension rather than a restriction, as in the instant case, of the Board's jurisdiction, the applicable principle remains the same, i.e., that there must be a showing of an effect on interstate commerce.

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the effect which the business had on interstate commerce. A few years later in *Polish Nat'l Alliance* v. *NLRB*,[21] the Court set forth what is now the accepted test of jurisdiction:

> Congress gave the Board authority to prevent practices "tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce. . . ."
>
> Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or not practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which, if left unchecked may well become far-reaching in its harm to commerce.[22]

Mr. Justice Black, however, in his concurring opinion, was not willing to go that far. He pointed out that while Congress had the power to enact laws which were "necessary and proper" to protect interstate commerce, clear findings of the effect on commerce have always been required "before subjecting local business to paramount federal regulation."[23]

In 1950, faced with the problem of a staggering case load and a limited budget, the Board, in accord-

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[21] 322 U. S. 643 (1944).

[22] Id. at 648.

[23] Id. at 652.

ance with the act,[24] promulgated jurisdictional standards.[25] Under these standards, the Board would exercise its powers only when the business involved had annual interstate purchases above certain minimum dollar values.[26] In 1954[27] and 1958[28] these standards were revised with a view toward limiting rather than expanding the Board's jurisdiction.

The prescribed standards, at first, seemed to solve the Board's caseload problem. However, after the revision in 1954, the Supreme Court, by its decision in *Guss* v. *Utah Labor Relations Bd.*,[29] created, in the labor-relations field, a so-called "no mans land."[30] In 1958 the Board relaxed its 1954 tests, limiting but not eliminating the "no mans land."[31] Section 701 of the Labor-Management Reporting and Disclosure

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[24] National Labor Relations Act Sec. 6(a), 49 Stat. 452 (1935), as amended, 29 U.S.C. Sec. 156 (1958).

[25] For a compilation of these standards, see 26 L.R.R.M. 50 (1950). See also *Hollow Tree Lumber Co.*, 91 N.L.R.B. 635 (1950). These standards reflected, for the most part, results reached by the Board in determining prior jurisdictional questions. 15 NLRB Ann. Rep. 5 (1950).

[26] The test later became a certain gross volume of business. See notes 27-28 infra.

[27] NLRB Press Releases Nos. 445 and 449, July 1 and 15, 1954, 34 L.R.R.M. 75 (1954).

[28] NLRB Press Release No. 576, Oct. 2, 1958, 42 L.R.R.M. 96 (1958). See *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958). The 1958 standards are in effect today except that they were extended to include the hotel industry in 1959. NLRB Press Release No. 610, May 14, 1959, 44 L.R.R.M. 70 (1959). For a detailed enumeration of these standards, see Comment, 28 Fordham Law Review, 737, 747-48 (1960).

[29] 353 U. S. 1 (1957).

[30] The *Guss* decision precluded state courts and agencies from acting on matters over which, because they affected commerce, the NLRB had, but declined to assert, jurisdiction since the minimum dollar value standard had not been met. Ibid. See Notes, 26 Fordham L. Rev. 349 (1957); 71 Harv. L. Rev. 179 (1957); 56 Mich. L. Rev. 133 (1957).

[31] See note 28 supra.

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Act,[32] amending Section 14 of the Taft-Hartley Act, attempted[33] to eliminate the remaining area of the "no mans land." State courts and agencies, under this amendment are permitted to act on matters over which the Board has declined to assert jurisdiction. The Board's jurisdiction has been frozen, so to speak, by the Reporting and Disclosure Act since the Board cannot "decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959."[34] Although the standards had now received congressional approval, they have yet to be formally approved by the United States Supreme Court.[35]

In the present case, respondent, Reliance Fuel Oil Corp., sold fuel oil to and serviced oil burners and boilers for home owners, all of whom lived in New York State. In 1959 it purchased from Gulf Oil Corp. fuel oil and products valued at more than $650,000. This oil was refined outside New York State and eventually shipped to stationary storage tanks in New York. Respondent's trucks then withdrew the oil from the storage tanks and delivered it

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[32] 73 Stat. 541 (1959), 29 U.S.C. Sec. 164 (Supp. II, 1959-1960).

[33] Since the vast majority of states are without labor relations statutes, the complainant over whom the NLRB declines to assert jurisdiction because he did not meet its dollar value standard could be left without a remedy. Note, 29 Fordham L. Rev. 604 (1961). See Comment, 28 Fordham L. Rev. 737 (1960). However, it might be argued that since a federal question is involved, federal law should be applied by the state. The question has yet to be answered.

[34] Labor-Management Reporting and Disclosure Act of 1959 Sec. 701(a), 73 Stat. 541, 29 U.S.C. Sec. 164(c) (1) (Supp. II, 1959-1960).

[35] "This Court has never passed and we do not pass today upon the validity of any particular declination of jurisdiction by the Board or any set of jurisdictional standards." *Guss* v. *Utah Labor Relations Bd.*, 353 U.S. 1, 4 (1957). See S. Rep. No. 187, 86th Cong., 1st Sess. 26 (1959).

directly to its customers.[36] The trial examiner, whose decision was adopted by the Board, found that the NLRB had jurisdiction of the dispute.[37]

The United States Court of Appeals for the Second Circuit, in refusing to enforce the order reasoned:

"The Supreme Court, however, seems never to have gone so far as to hold that mere size of a local business or amount of its purchases within the state of materials the origin of which was outside the state, without relation to other factors necessarily brings it within the Act."[38] Anticipating possible review by the Supreme Court, the court stated that it seemed unlikely, because of the caution expressed in *Howell Chevrolet Co.* v. *NLRB*,[39] and *Polish Nat'l Alliance* v. *NLRB*,[40] that the Supreme Court would today adopt a pure "quantitative" test.[41] Therefore the

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[36] *Reliance Fuel Oil Corp.*, 129 N.L.R.B. 1166, 1170 (1961).

[37] Id. at 1171.

[38] 297 F. 2d at 97.

[39] 346 U.S. 482 (1953). This case involved an automobile dealer in California whose purchases from General Motors exceeded $1,000,000. The Court upheld the Board's assertion of jurisdiction because the evidence showed such a close supervision of the dealer's activities by General Motors that it was "'an integral part' of General Motors' national system of distribution." Id. at 484.

[40] 322 U.S. 643 (1944); see notes 21-23 supra and accompanying text.

[41] An analogy can be developed here. In a recent decision, *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), 30 Fordham L. Rev. 493 (1962), the Supreme Court abandoned a "quantitative substantiality" test in favor of a "rule of reason" or "qualitative substantiality" test to determine market foreclosure under Section 3 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. Sec. 14 (1958). While the "quantitative" test in Tampa had originally been judicially imposed and in the instant case it has been imposed by the NLRB, an administrative body, the analogy remains, for the Supreme Court showed its willingness to abandon an easier, more practical test in favor of a more difficult to apply, yet fairer test.

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court remanded the case to the NLRB to take more evidence to fill in a "reasonably complete picture of the manner in which a work stoppage would affect commerce . . . before we rule on the jurisdictional issue."[42] In denying the petition for rehearing the court reiterated what it deemed to be the jurisdictional test laid down by Congress, namely:

"If the employer is himself engaged in interstate commerce, without more the jurisdiction of the Board is established. If the employer is not engaged in interstate commerce, the acts in question must lead or tend to lead to a dispute which must burden or obstruct the free flow of interstate commerce."[43]

Similarly in *Benevento*[44] the Board's jurisdiction was based on the trial examiner's finding that

> "during the calendar year preceding the issuance of the complaint, respondent sold products valued in excess of $50,000 to . . . which company during the same calendar year purchased and received, from sources outside the Commonwealth of Massachusetts, products valued in excess of $50,000."[45]

The first circuit in refusing to enforce the Board's order stated that "broad though the Board's power may be it is not unlimited."[46] The court reasoned that "the Board's jurisdiction is necessarily subject to bounds and the criterion for determining where

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[42] 297 F. 2d at 99.
[43] Ibid.
[44] 297 F. 2d 873 (1st Cir. 1961).
[45] Michael Benevento, 131 N.L.R.B. 358, 361 (1961).
[46] 297 F. 2d at 874.

those bounds lie is the effect, if any, of purely local action upon interstate commerce,"[47] and therefore concluded that "clear findings of fact based upon legally sufficient evidence must be made by the Board to support its assertion of jurisdiction."[48]

The NLRB's position in both cases is that since respondents met its gross dollar standard and dealt with firms engaged in commerce, they must necessarily affect interstate commerce. As previously noted, originally the Board's jurisdiction was so broad that it heretofore imposed limitations upon itself.[49] In both of these cases, however, it seems that the Board, by its preoccupation with jurisdictional standards, has overlooked the original test laid down by Congress.[50] Throughout the years the Supreme Court has consistently maintained that it is the effect on commerce and not a gross volume of business which is the standard.[51]

While it is arguable that a company which does a gross volume of business in excess of $500,000 and which purchases its products from one engaged in interstate commerce[52] would, if involved in a labor dispute, affect interstate commerce, such a conclusion, as the NLRB has itself admitted, is not a necessary

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47 Id. at 875.

48 Id. at 876.

49 See notes 24-28 supra and accompanying text.

50 See note 15 supra.

51 See notes 14-23 supra and accompanying text.

52 Or, as in *Benevento*, that one who sells products valued in excess of $50,000, to one who purchases products from outstide the state.

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conclusion.[53] By virtue of its present argument, however, it would appear that the Board has reversed its former position.

The Board's present position is a pragmatic one; if it is forced to take more evidence in these cases it would have to drastically revise its present procedure of deciding jurisdictional questions. But the Board itself has recognized the dual requirement before it can assert jurisdiction.[54]

It may be that the Supreme Court will agree with the Board and in approving its standards promulgate an easily applied "quantitative" test. In reaching this conclusion the Court might rely on the congressional approval given the standards in the Labor-Management Reporting and Disclosure Act.[55] This

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[53] "It is possible, although highly improbable, that an enterprise meeting the gross dollar standards of the Board would not come within the broad definition of 'affecting commerce,' even though that term has been judicially determined to indicate an intention on the part of Congress to exercise Federal jurisdiction to the fullest possible extent. For this reason we agree . . . that the gross dollar volume test, standing alone, is insufficient to confer upon the Board the jurisdiction contemplated by the Act." *International Longshoremen & Warehousemen's Union*, 124 N.L.R.B. 813, 815 (1959).

[54] "The Board's current standard for exercising jurisdiction over a retail enterprise which falls within its statutory jurisdiction is 'a gross volume of business of at least $500,000 per annum . . . .' In such instances 'some proof must be made of legal jurisdiction,' that is, that the employer involved is engaged in commerce or that his operations affect commerce . . . in addition to a showing that the relevant gross volume test has been satisfied." *Westside Market Owners Ass'n*, 126 N.L.R.B. 167, 169 (1960); see *James D. Jackson*, 126 N.L.R.B. 875 (1960); *International Longshoremen & Warehousemen's Union*, supra note 53.

[55] Section 701(a) of the act, 73 Stat. 541 (1959), 29 U.S.C. Sec. 164(c) (1) (Supp. II, 1959, 1960); see notes 32-35 supra and accompanying text.

seems unlikely for two reasons: First, the act still requires a showing of an effect on commerce and second, had Congress wanted to adopt a single quantitative test it would have expressly done so.

It is respectfully submitted that the first and second circuits' adherence to the established principles laid down in *Jones & Loughlin, Consolidated Edison, Polish National Alliance,* and *Fainblatt* is far more just and legally sound than the Board's reliance on its non-judicially approved self imposed standards.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be affirmed.

SAMUEL H. BORENKIND
Attorney for Respondent

September 24, 1962.

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SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1962.

National Labor Relations Board, Petitioner, *v.* Reliance Fuel Oil Corporation.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January 7, 1963.]

Per Curiam.

The Reliance Fuel Oil Corporation, respondent herein, was found by the National Labor Relations Board to have committed certain unfair labor practices in violation of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* Jurisdiction before the Board was predicated upon the fact that Reliance, a New York distributor of fuel oils whose operations were local,[1] purchased within the State a "substantial amount" of fuel oil and related products from the Gulf Oil Corporation, a supplier concededly engaged in interstate commerce. Most of the products sold to Reliance by Gulf were delivered to Gulf from without the State of New York and prior to sale and delivery to Reliance were stored, without segregation as to customer, in Gulf's tanks located within the State. During the fiscal year ending June 30, 1959, Reliance had gross sales in excess of $500,000 [2] and, during the calendar year 1959, it purchased in excess of $650,000 worth of fuel oil and related products from Gulf.

The Board adopted its trial examiner's findings that the operations of Reliance "affected commerce" within the

[1] In 1959 Reliance purchased a few hundred dollars worth of truck parts in New Jersey, but the Board did not rely on such transactions to sustain its assertion of jurisdiction.

[2] Since the Board apparently treated Reliance as a "retail" concern, this amount of gross sales met its self-imposed standard for exercise of jurisdiction. 129 N. L. R. B. 1170–1171.

meaning of the Act and that the unfair labor practices found tended "to lead to labor disputes burdening and obstructing commerce and the free flow of commerce . . . ." 129 N. L. R. B. 1166. The Court of Appeals reversed, 297 F. 2d 94, because, in its view, the record before the Board did not adequately demonstrate the existence of jurisdiction and remanded the case to the Board so that it might "take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce." The only issue before this Court is whether on the record before it the Board properly found that it had jurisdiction to enter an order against Reliance; the substantive findings as to the existence of the unfair labor practices are not here in dispute.

Under § 10 (a) of the Act, the Board is empowered "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." Section 2 (6) defines "commerce" to mean "trade, traffic, commerce, transportation, or communication among the . . . States . . . ." and § 2 (7) declares:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause. See, *e. g.*, *Guss* v. *Utah Labor Board*, 353 U. S. 1, 3; *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 647–648; *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607. Compare *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 480. The Act establishes a framework within which the Board is to de-

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termine "whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *Labor Board*, *supra*, 322 U. S., at 648. See also *Labor Board* v. *Fainblatt*, *supra*, 306 U. S., at 607–608.

That activities such as those of Reliance affect commerce and are within the constitutional reach of Congress is beyond doubt. See, *e. g.*, *Wickard* v. *Filburn*, 317 U. S. 11. Through the National Labor Relations Act, ". . . Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish Alliance* v. *Labor Board*, *supra*, 322 U. S., at 648. This being so, the jurisdictional test is met here: the Board properly found that by virtue of Reliance's purchases from Gulf, Reliance's operations and the related unfair labor practices "affected" commerce, within the meaning of the Act. The judgment of the Court of Appeals accordingly must be and is reversed.

MR. JUSTICE BLACK concurs in the result.